89-1273

Supreme Court, U.S.
FILED
JAN 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

ROBINS, KAPLAN, MILLER & CIRESI
James R. Safley
Counsel of Record
E. Anne McKinsey
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Petitioner

1990 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518 ■
FAX 612-337-8053

SS pd

QUESTIONS PRESENTED

I

Whether a "contract, combination or conspiracy" is formed under Section 1 of the Sherman Act when a defendant supplier uses threats, coercion and intimidation to prevent customers from bidding against the supplier for federal government defense contracts.

II

Whether a plaintiff in a Section 1 "rule of reason" case has the burden of establishing a "relevant market" in accordance with monopoly standards developed under Section 2 of the Sherman Act.

III

Whether a directed verdict ruling for the defendant is proper in a Section 1 "rule of reason" case in which there are contested fact issues and the jury, answering special interrogatories, has found that the defendant supplier's restraints on customer bid activity constituted a contract, combination or conspiracy which unreasonably restrained trade in the sale of parts to the government.

IV

Whether an appellate court is justified in departing from established judicial precedent and placing substantial reliance on administrative guidelines which have been expressly repudiated by Congress as an inaccurate expression of the federal antitrust laws.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 2

Reasons for Granting the Writ 11

I

The Sixth Circuit's finding that a "contract, combination or conspiracy" was not formed under Section 1 of the Sherman Act, when a supplier used threats, coercion, intimidation and other means to prevent customers from bidding against a supplier for government defense contracts, is directly contrary to decisions of this Court and other federal courts of appeal 12

II

The Sixth Circuit's requirement that petitioner prove a "relevant market" in accordance with Section 2 monopoly standards exemplifies the widespread confusion which now exists in the appellate courts regarding the proof necessary to establish a "rule of reason" violation of Section 1 of the Sherman Act 16

III

The Sixth Circuit's affirmation of a directed verdict ruling following trial of a "rule of reason" case in which the jury found that the defendant supplier entered into a contract, combination or conspiracy to unreasonably trade or commerce in the sale of parts to the government was a departure from accepted judicial procedure warranting intervention of this Court 21

IV

The Sixth Circuit's substantial reliance upon Department of Justice Vertical Restraint Guidelines that have been expressly repudiated by Congress was an abuse of federal judicial power, mandating review by this Court in the exercise of its supervisory authority 25

Conclusion 27

Appendices 28

TABLE OF AUTHORITIES

Page

Cases:

Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336 (11th Cir. 1987) 24

Albrecht v. Harold Co., 390 U.S. 145 (1968) 12

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 21

Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979), *cert. denied,* 446 U.S. 918 (1980) 14

Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981) 15, 16, 22

Berry v. United States, 312 U.S. 450 (1941) 23

Board of Regents of University of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983), *aff'd,* 468 U.S. 85 (1984) 17

Board of Trade of Chicago v. United States, 246 U.S. 231 (1918) 18

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) .. 19

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977) 24

Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3rd Cir. 1978), *cert. denied,* 439 U.S. 876 (1978) ... 17

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 21

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 19

Ex parte Peterson, 253 U.S. 300 (1920) 23

FTC v. Indiana Fed'n of Dentists,
476 U.S. 447 (1986) 19

Fishman v. Estate of Wirtz, 807 F.2d 520
(7th Cir. 1986) 18

Fleer Corp. v. Topps Chewing Gum, Inc.,
658 F.2d 139 (3rd Cir. 1981), *cert. denied*,
455 U.S. 1019 (1982) 17

Home Placement Service, Inc. v. Providence Journal
Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*,
460 U.S. 1028 (1983) 14

International Logistics Group, Ltd. v. Chrysler Corp.,
884 F.2d 904 (6th Cir. 1989) ..... *passim*

Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711
(S.D.N.Y. 1969) *aff'd*, 417 F.2d 621
(2nd Cir. 1969) 24

Isaksen v. Vermont Castings, Inc., 825 F.2d 1158
(7th Cir. 1987), *cert. denied*, 108 S. Ct. 1728
(1988) 14

Jayco Systems, Inc. v. Savin Business Machines Corp.,
777 F.2d 306 (5th Cir. 1985), *cert. denied*,
479 U.S. 816 (1986) 18

Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1972),
cert. denied, 409 U.S. 1077 (1972) 14

McMullen v. Hoffman, 174 U.S. 639 (1899) 20

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 27

Martin B. Glauser Dodge Co. v. Chrysler Corp.,
570 F.2d 72 (3rd Cir. 1977), *cert. denied*,
436 U.S. 913 (1978) 24

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752
(1984) 12, 13

National Reporting Co. v. Alderson Reporting Co.,
763 F.2d 1020 (8th Cir. 1985) 24

National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978) 18, 19

Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983) 24

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 12

Swift & Co. v. United States, 196 U.S. 375 (1905) 19

Syufy Enterprises v. American Multicinema, Inc., 783 F.2d 878 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) 24

T.V. Signal Co. v. AT&T, 617 F.2d 1302 (8th Cir. 1980) 18

Thor Power Tool Co. v. Weintraub, 791 F.2d 579 (7th Cir. 1986) 23

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd and modified on other grounds*, 175 U.S. 211 (1899) 20

United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) 13

United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377 (1956) 16

United States v. Fischbach & Moore, Inc., 750 F.2d 1183 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985) 13

United States v. Klearflax Linen Looms, 63 F. Supp. 32 (D. Minn. 1945) 24

United States v. Koppers Co., 652 F.2d 290 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981) .. 13

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 12, 14

United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982) 13

United States v. W. F. Brinkley & Sons Construction Co., 783 F.2d 1157 (4th Cir. 1986) 13

United States v. Young Bros., Inc., 728 F.2d 682 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) ... 13

Woods v. Holy Cross Hospital, 591 F.2d 1164 (5th Cir. 1979) 23

World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985), *cert. denied*, 474 U.S. 823 (1985) 14

Yentsch v. Texaco, Inc., 630 F.2d 46 (2nd Cir. 1980) 14

Statutes:

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 2 ..... *passim*

15 U.S.C. § 15 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 2

28 U.S.C. § 1337(a) 2

Other Authorities:

7 P. Areeda, Antitrust Law (1986) 19

Departments of Commerce, Justice and State, The Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136 (1985) 25

Department of Justice Vertical Restraint Guidelines, 50 Fed. Reg. 6263 (1985) 25-27

Report of the American Bar Association Section of Antitrust Law, Task Force on the Antitrust Division of the U.S. Department of Justice, 57 Antitrust & Trade Reg. Rep. (July 19, 1989) 26

Vertical Restraint Guidelines as Adopted by the National Association of Attorneys General, 4 Trade Reg. Rep. (CCH) (1985) 26

9 C. Wright & A. Miller, Federal Practice and Procedure (1971) 21

No. _____

In the

Supreme Court of the United States

October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

The petitioner, International Logistics Group, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 7, 1989.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan is reported at 1988-2 Trade Cas. (CCH) para. 68,127 (1988) (Appendix B-1). The opinion of the United States Court of Appeals for the Sixth Circuit, entered on September 7, 1989, is reported at 884 F.2d 904 (1989) (Appendix A). The Sixth Circuit Court of Appeals denied a petition for rehearing *en banc* on November 2, 1989 (Appendix C-2).

STATEMENT OF JURISDICTION

The opinion of the Sixth Circuit Court of Appeals was entered on September 7, 1989. The Sixth Circuit Court of Appeals denied a timely petition for rehearing *en banc* on November 2, 1989. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, Title 15, United States Code, Section 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the United States, or with foreign nations, is declared to be illegal ...

STATEMENT OF THE CASE[1]

Petitioner International Logistics Group, Ltd. ("ILG") is a Michigan corporation formed in 1975 by its principal shareholder, Theodore Henke. ILG's principal business activity was the purchase and resale of replacement parts to the United States government for use in military and fleet

---

[1]This antitrust case, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, was originally brought on behalf of petitioner and co-plaintiffs Aargus Truck and Automotive Supply, Inc. ("Aargus") and Guardian Auto Supply, Inc. ("Guardian") in the United States District Court for the Eastern District of Michigan pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, and 28 U.S.C. §§ 1331, 1337(a). The antitrust claims of Aargus and Guardian related to an alleged conspiracy to restrain trade in the sale of "Power Master" engines and other parts to Chrysler dealers, and are not the subject of this petition. This "Statement of the Case" is limited to those facts and proceedings relevant to the antitrust claim charging respondent Chrysler with restraining trade in the sale of parts to the United States government in violation of Section 1 of the Sherman Act.

vehicles. ILG sold vehicle parts to various agencies of the federal government, including the Army, Navy, Marines, Air Force and General Services Administration. (Tr. 574.)[2]

Respondent Chrysler Corporation ("Chrysler") served as ILG's principal parts supplier. (Tr. 507, 541.) Parts were purchased by ILG through Chrysler's Export Division, known as Interparts.[3]

Restraints imposed on customer bid competition. In the 1970's, there were no rules or restrictions which prevented ILG from reselling Chrysler parts to the government. (Tr. 508-09,781.) The government typically purchased these parts through a competitive bid process. Chrysler not only allowed but encouraged ILG to bid on government contracts, both foreign and domestic. (Tr. 507-09, 568-71.) Chrysler representatives furnished assistance to ILG such as sales leads and information necessary to cross-reference Chrysler parts to the corresponding government part numbers. (Tr. 509-10, 570-71, 579.)

As ILG's military parts business grew, it began to compete directly with Chrysler for government defense contracts. In 1979 or 1980, ILG planned to submit a competitive bid to the government for certain military parts which were to be shipped to Saudi Arabia. Chrysler parts representatives called Henke to their headquarters and asked that ILG not submit a competitive bid. According to

---

[2]References to the consecutively paginated trial transcript are designated "Tr." Plaintiffs' and defendant's exhibits are designated "P.Ex." and "D.Ex." respectively. "R." refers to the record entry on the district court docket. "App." refers to the Appendix to this petition.

[3]The Sixth Circuit's opinion describes the parts at issue as being "actually manufactured by Chrysler or by its licensees from Chrysler dies and fixtures." *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 905 n. 1 (6th Cir. 1989) (hereinafter *"ILG v. Chrysler"*). However, the parties stipulated at trial that 70% of the parts sold by Chrysler were produced by several thousand outside vendors. The record does not indicate the extent to which these vendors were licensed to use Chrysler dies and fixtures, so the court's shorthand term "Chrysler manufactured parts" is a misnomer.

Henke, "They just said they were planning on bidding on this job and we should not bid on the job." (Tr. 588-89.)

In July 1981, ILG successfully bid on a government contract which called for the delivery of 75 Chrysler transmissions. Chrysler did not bid on this contract, and an Interparts representative actually helped ILG modify a transmission to meet the bid specifications. (Tr. 584, 894-95; P. Ex. 501.) Shortly afterward, in September 1981, the government issued a follow-up invitation for bids on a much larger contract, for 885 transmissions. This time, Chrysler told ILG not to bid, as Chrysler wanted to bid the job for itself. (Tr. 562-63.) However, ILG did submit a competitive bid which was substantially below the bid of Chrysler. (D. Ex. 27.)

In response to this competitive activity, Chrysler filed a bid protest with the government against ILG and refused to provide ILG with parts to satisfy the transmission contract. (Tr. 582-83.) Then Chrysler began to slow deliveries of parts to ILG, which caused it to become delinquent on other government contracts. (Tr. 515-16.) Chrysler also refused to quote parts prices to ILG when Chrysler intended to bid on contracts for those parts. (Tr. 511.)

During this same period, Chrysler devised a method of allocating bids between itself and its parts customers. In June 1982, Chrysler proposed that it would bid on large contracts, while dealers and other customers could have the smaller ones. (Tr. 392; P. Ex. 161.) Accordingly, in September 1982, Chrysler decided to withdraw its bid on the renewal of an Indefinite Delivery Type Contract ("I.D.T.C.") which called for parts deliveries under $10,000. (Tr. 397-98.) Chrysler would permit its dealers, exporters and other customers to bid on this contract, while reserving to itself solicitations for larger and more lucrative contracts. (P. Ex. 237.)

Chrysler also began to exert more pressure on customers not to bid against Chrysler. In a March 1983 memo, a Chrysler parts executive identified several Interparts customers, including ILG, that continued to pursue government parts business in competition with Chrysler. One

customer was castigated because it was "apparently not content with just the I.D.T.C. contract." The memo concluded, "This activity must be stopped immediately." (P. Ex. 185.)

In May 1983, Chrysler parts executives met and "discussed the problem of controlling bids related to government contracts." A memo memorializing the meeting noted that Interparts customers had been accused of pursuing government bids "at prices competitive to Parts Division quotes" and that Chrysler was "attempting to control Interparts customers from quoting on government bids even though the ultimate distribution was overseas." (P. Ex. 223.)[4]

Chrysler's attempts to control competitive bids went far beyond the mere announcement of a policy. Chrysler regularly subjected customers to audits, prices penalties, surveillance and threats of termination if they bid in competition with Chrysler. (Tr. 1100-01; P. Ex. 227, 264, 328). By June 1982, National Accounts customers (*i.e.*, customers that sold parts domestically) were to be subject to audits and billed higher prices if they sold parts to the government. Chrysler also enlisted the support of National Accounts customers to ensure that their own customers did not sell to the government. An internal memo noted Chrysler's policy that "All National Accounts [are] to be informed that they cannot supply parts to their customers bidding and supplying parts to Federal Government." (P. Ex. 161.)

---

[4] This memorandum plainly refuted Chrysler's contention at trial that it was only attempting to enforce orderly "export" rules by restraining government bid competition. Other memoranda evidenced that customers that could sell parts domestically were similarly constrained from bidding against Chrysler on government contracts. (P. Ex. 158, 161.) Chrysler executives conceded at trial that they sought to prevent all customers from bidding on government contracts in competition with it. (Tr. 436-39; P. Ex. 303.)

The pressure on Interparts customers like ILG became so intense that in November 1983 the manager of Interparts complained that "the degree of controls that are being placed on export sales seem unique to Chrysler" and appeared to be "overkill." (P. Ex. 260.) Yet one month later, a senior Chrysler parts executive stated, "The surveillance of exporters is the clear responsibility of the Committee [an internal Parts Sales Coordination Committee] and, where the evidence suggests, we will again confront the accounts thought to be disruptive." (P. Ex. 264.)

A representative of one Interparts customer, UWD, testified at trial that he was coerced by Chrysler in early 1983 to withdraw a competitive bid for a government contract. UWD did not want to withdraw its bid but was intimidated into doing so by Chrysler. (Tr. 498-99.) In that regard, the UWD representative testified, "[The Chrysler official] explained to me that the powers to be thought it would be a good idea if I didn't quote this." (Tr. 481.) After UWD withdrew its bid, Chrysler was able to win the contract. (Tr. 485.)

Petitioner ILG was not only asked to withdraw competitive bids, but was subjected to an audit in 1983 to determine if it had purchased parts from Chrysler to deliver to the government. (P. Ex. 223.) The problem of controlling ILG's competitive bid activity persisted when Henke would not agree to Chrysler's demands. He explained at trial that the government was ILG's main source of business, and that ILG could not continue in business if it had to stop selling parts to the government. (Tr. 636-37.)

At a meeting of Chrysler parts executives scheduled in June 1983, ILG was identified as the "Account who competes with Chrysler on Government bids." (P. Ex. 228; Tr. 235-36.) The minutes of the meeting reflect that ILG "sold to the U.S. Government for export" and was then terminated by Chrysler for competing with it. (P. Ex. 227; Tr. 242-43.)

Chrysler's efforts to control customer competitive bid activity did not end with the termination of ILG. UWD, which was allowed to continue to buy parts after it agreed to withdraw a competitive bid in 1983, was eventually termi-

nated in 1984 for submitting another bid in competition with Chrysler. The same thing happened in 1984 to another customer, Federal Parts, after it successfully bid against Chrysler on several government contracts. (Tr. 256-60; P. Ex. 328.)

In 1985, Chrysler's government bid allocation scheme was reduced to writing with a new parts customer, Jamco Industries. Jamco contractually agreed that it would not bid on government contracts in excess of $10,000 without Chrysler's prior permission, and that if it did so, this would be grounds for termination. (Tr. 1187.) Chrysler actively monitored this agreement, and Jamco was refused permission to bid on several occasions. (Tr. 926-27, 1193-94.)

Unique status of government as a parts purchaser. The trial record shows without contradiction that the government was a separate and distinct purchaser of Chrysler replacement parts. The Chrysler executive responsible for government parts sales testified that the bid process used by the government made it a unique customer, and that parts sold to the government had to be treated in a special way—*e.g.*, with special rustproofing, packaging, and coatings. (Tr. 387, 403-04.) When the trial court asked this witness what made the government unique, he replied, "Nobody has ever requested those kinds of things other than the Federal Government." (Tr. 404.)

Other evidence supported the uniqueness of the government as a customer. The government has its own language for use in procuring parts; it does not use the manufacturer's name and part number, but rather uses a national stock number. (Tr. 493.) The packaging required by the government can be substantially different from packaging used commercially. Parts sold to the government have to be protected and remain in usable shape until they are retrieved. The parts may have to be shockproofed and made resistant to magnetic forces, moisture and abrasion. When the packaging is done properly, it will allow for a part to be stored anywhere in the world. For example, parts may be air-dropped on to a rice paddy and stored three to four months before a military unit retrieves them. (Tr. 494-95.)

ILG's government contract administrator described the complexity of the government bid process to the trial court. She found out about government contracts by receiving "requests for quotes" from the government or by reviewing publications. She then cross-referenced the government's national stock number to the manufacturer's part number using the microfiche card ILG purchased from the government. She reviewed past quotes and current prices, checked on the availability of the parts and determined how much packaging would cost. In some instances, parts had to be made according to specific requirements. (Tr. 516-20.)

ILG's economic expert testified on the basis of these and other facts that the sale of parts to the government suitable for use in Chrysler vehicles was a relevant market to consider for purposes of antitrust analysis. (Tr. 1228.)

Injury to competition. The trial record also shows unequivocally that Chrysler's customer bid restraints had a substantial adverse impact on competition. As shown, the restraints were imposed to suppress direct price competition from ILG and other parts customers who were qualified to participate in the government bid process.

Chrysler was able to enjoy unusually high margins on government parts sales (Tr. 1055), and the customer bid restrictions were motivated by a desire to maximize these profits. (Tr. 440-42.) The restraints allowed Chrysler to substantially increase parts sales to the government and at the same time continue to charge high prices.

Chrysler intentionally chose to suppress customer bid competition rather than reduce prices to the government. An internal memorandum reacting to a customer's competitive bid pointed out that one alternative was to "rebid and lose approximately $15,000 in profit and establish a precedent that would similarly reduce profits on future contracts." Instead, Chrysler chose not to change its bid and terminated the customer that won the bid. (P. Ex. 320.)

Chrysler's own records showed that its government parts sales almost doubled after the bid restraints were imposed on customers, increasing from $8.9 million in 1982 to $16.3 million in 1984. (P. Ex. 330.) Remarkably, this sales increase

occurred during a time when the government was very dissatisfied with Chrysler's performance as a parts supplier. (P. Ex. 161.) Chrysler parts executives conceded at trial that Chrysler was regarded as a poor supplier and that it was frequently delinquent in deliveries. (Tr. 399-400, 1056.)

The government itself recognized that parts competition had been restrained. Indeed, the Commander of the Defense Logistics Agency wrote to Chrysler in March 1985 and complained that "Chrysler Service and Parts division is one of my largest sources of non-competitive supply." (P. Ex. 349.)

Chrysler's customer bid restraints were not only intended to but did suppress competition. Petitioner's economic expert concluded that the action taken by Chrysler to eliminate bid competition could only result in higher prices to the government and unreasonably restrain trade in the sale of parts suitable for use in Chrysler vehicles.[5]

The jury's verdict and opinions below. A bifurcated jury trial on the issue of Chrysler's liability on the antitrust claims of petitioner and the other plaintiffs commenced February 4, 1988. The case was submitted to the jury on February 25, on special interrogatories. (App. D.) On the third day of the jury's deliberations, the trial court directed a verdict for Chrysler on all counts, but it allowed the jury to continue to deliberate. (Tr. 1862-63.) Two days later, the jury returned answers to the special interrogatories, finding, *inter alia*, the existence of a conspiracy, a "relevant market" in the sale to the government of parts suitable for use in

---

[5]The concurring opinion of the Sixth Circuit Court of Appeals uncritically accepted the district court's finding that "[f]or each of the years 1984 through 1986, the Government purchased between $16.7 million and $19.7 million worth of spare parts that Chrysler could have supplied, but Chrysler in fact supplied only 21% to 24% of these totals." *ILG v. Chrysler*, 884 F.2d at 911. However, this finding was based on a subsequently discredited affidavit filed with Chrysler's pretrial motions and authored by a person who was not a trial witness. Chrysler's own data showed that its government parts sales in 1984 alone were $16.3 million (P. Ex. 330), belying the market percentage assumed by the concurring member of the Sixth Circuit panel.

Chrysler vehicles, and an unreasonable restraint of trade in the government market. (Tr. 1933-34; App. D.) However, the court ruled that the jury was deadlocked since it was unable to reach a unanimous verdict on the question of whether plaintiffs were injured as a result of the conspiracy in the government market. (Tr. 1865.)[6]

On April 6-8, 1988, the trial court dictated into the record its findings of fact and conclusions of law in support of its directed verdict ruling (as well as a prior summary judgment order not at issue in this petition). (Tr. 4/6-8/88; App. B-1.) Disregarding the evidence and the jury's findings to the contrary, the trial court found that there was no conspiracy between Chrysler and its parts customers, and that the government did not constitute a "relevant market" for purposes of antitrust analysis. (Tr. 4/6-8/88, at 10, 32.) On May 17, 1988, judgment was entered in favor of Chrysler. (R. 263; App. B-2.) On May 23, the court denied the motion of plaintiffs for an order vacating the directed verdict and ordering partial judgment in their favor based upon the jury's answers to the special interrogatories. (R. 264; App. B-3.)

Petitioner and the other plaintiffs appealed the judgment to the Sixth Circuit, which affirmed the district court's directed verdict ruling in all respects on September 7, 1989. (App. A.) The appellate court's opinion did not address the evidence in the trial record which supported ILG's claim that Chrysler coerced its customers to allocate bids on government defense contracts, but concluded that the bid restraints did not "rise to the level of cognizable Section 1 and Section 2 Sherman antitrust action." *ILG v. Chrysler*, 884 F.2d at 908. The appellate court found no "contract, combination or conspiracy," holding that Chrysler engaged only in "unilateral acts." *Id.* at 907. The appellate

---

[6] It was difficult for ILG to prove antitrust "injury" at trial, due to the court's ruling that damage evidence would not be admitted during the first phase of the bifurcated trial. Nonetheless, the jury reported to the court, before it was excused, that it was split 5-1 in plaintiffs' favor on the question regarding the fact of their damage from Chrysler's unfair competition. (Tr. 1919, 1921, 1934.)

court also held that ILG failed to come forward with "proof of sufficient weight" to establish that the government was a relevant market. *Id.* at 908-09. The jury's answers to special interrogatories favorable to ILG on the government conspiracy claim were not mentioned in the appellate court's opinion. A petition for rehearing *en banc* was denied by the Sixth Circuit on November 2, 1989. (App. C-2.)

This petition seeks review of the judgment entered against petitioner in the lower courts.

REASONS FOR GRANTING THE WRIT

This case presents questions which are of exceptional importance to the continued enforcement of Section 1 of the Sherman Act by civil litigants. Review is sought so that this Court may directly address the burdens which should be imposed upon the plaintiff in a Section 1 "rule of reason" case. Such review is especially timely in the wake of recent decisions of this Court approving use of the rule of reason standard in most vertical restraint cases. Here, the Court has the benefit of a full record developed during a rule of reason trial.

The questions raised by this petition are even more critical insofar as the restraints at issue were applied by Chrysler to prevent petitioner and other customers from bidding on government defense contracts. The proof at trial was sufficient to convince a jury that Chrysler had conspired to unreasonably restrain trade in the sale of parts to the government. At a time when military defense spending has been grossly inflated, and procurement practices notoriously abused, there is special need for this Court to scrutinize an appellate court holding which completely disregards a jury's verdict and applies new and unwarranted standards in affirming a directed verdict ruling for a defendant government contractor. The need for review is even more pronounced given that the new legal standards are at odds with this Court's prior opinions, conflict with holdings of other federal courts of appeal and rely heavily on administratively fashioned "Vertical Restraint Guidelines" which have been expressly repudiated by Congress.

In sum, this petition raises significant issues of national importance which far transcend the interests of the immediate parties.

I

THE SIXTH CIRCUIT'S FINDING THAT A "CONTRACT, COMBINATION OR CONSPIRACY" WAS NOT FORMED UNDER SECTION 1 OF THE SHERMAN ACT, WHEN A SUPPLIER USED THREATS, COERCION, INTIMIDATION AND OTHER MEANS TO PREVENT CUSTOMERS FROM BIDDING AGAINST A SUPPLIER FOR GOVERNMENT DEFENSE CONTRACTS, IS DIRECTLY CONTRARY TO DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

It has long been settled law that the acquiescence of a customer to a supplier's demands secured through coercion satisfies the "contract, combination or conspiracy" requirement of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765-66 (1984); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968); *Albrecht v. Harold Co.*, 390 U.S. 145, 149-50 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). This Court has never deviated from that standard. In *Parke Davis*, this Court found the requisite combination, contract or conspiracy existed where the defendant manufacturer obtained the active assistance of wholesalers by threatening termination, seeking assurances from non-complying retailers that they would support the manufacturer's pricing policy, and arranging the suspension of discount advertising by retailers—all in an effort to enforce its resale price maintenance program among its retailers. The Court held, "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices ... he has put together a combination in violation of the Sherman Act." 362 U.S. at 44.

As in *Parke-Davis*, Chrysler went well beyond a mere announcement of a policy and employed the use of threats,

intimidation, surveillance, audits and price penalties to prevent its customers from bidding against it in sales to the government. Such actions by Chrysler secured the customers' adherence to a "contract, combination or conspiracy" to allocate bids in the sales of parts to the government.[7] The Sixth Circuit's conclusion that Chrysler acted "unilaterally" because it did not need the acquiescence of ILG and other customers, *ILG v. Chrysler*, 884 F.2d at 907, is directly refuted by the trial record. ILG proved that Chrysler did need and actively sought customers' acquiescence, and went to extreme measures to control customers' bid activities—even to the point of "overkill," according to one Chrysler executive. The trial record shows that the termination of ILG was done in furtherance of Chrysler's scheme to prevent customers from bidding against it for government defense contracts.[8]

In *Monsanto*, this Court affirmed a judgment for the plaintiff, a noncomplying distributor, based upon "circumstantial" evidence of enforcement activities by the defendant with other distributors that occurred after the

---

[7] Courts have long found that arrangements to allocate bids clearly satisfy the contract, combination or conspiracy requirement of Section 1 of the Sherman Act. *E.g., United States v. W.F. Brinkley & Sons Construction Co.*, 783 F.2d 1157, 1160 (4th Cir. 1986) (bid allocation scheme for the construction of a municipal water pumping station); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-96 (3th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985) (bid rigging scheme for electrical construction projects); *United States v. Young Bros., Inc.*, 728 F.2d 682, 687 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) (bid rigging and allocation scheme for state highway construction project); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982) (bid allocation scheme for state highway construction projects); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) (bid allocation scheme for state highway construction projects). This is true even where, as here, one of the competitors is a supplier of the other. *United States v. Koppers Co.*, 652 F.2d 290, 296-97 (2nd Cir. 1981), *cert denied*, 454 U.S. 1083 (1981).

[8] The Sixth Circuit's holding requires one to assume that Chrysler did not "need" the customer's acquiescence which it actively sought.

termination of the plaintiff: "It would be reasonable to find that [there was evidence of an agreement with one or more distributors] since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated." 465 U.S. at 767. In addition to its departure from this Court's pronouncements, the Sixth Circuit's holding directly contradicts the well-founded opinions of other federal circuit courts of appeal which hold that when a supplier, such as Chrysler, goes beyond the mere announcement of a policy and engages in coercive activities which effect adherence to the announced policy, the requisite contract, combination or conspiracy is established.[9]

The Sixth Circuit's holding effectively immunizes Chrysler's coercive bid allocation activities and renders *Parke-Davis* and its 30-year progeny meaningless. The use by Chrysler of threats, coercion, intimidation, surveillance, audits, price penalties and ultimately termination of ILG in an effort to gain its customer's acquiescence in its bid

---

[9] *See, e.g., Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1162-64 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1728 (1988) (adherence achieved by threats to mix up orders if plaintiff did not raise prices); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1475-76 (10th Cir. 1985), *cert denied*, 474 U.S. 823 (1985) (competing dealers' complaints together with agreement of another dealer to maintain prices and the acquiescence by plaintiff achieved through the use of a credit hold arrangement and purchase restrictions constituted the requisite conspiracy); *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274, 279 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) (plaintiffs' agreement to the supplier's stated conditions of doing business constituted concerted action); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53-54 (2nd Cir. 1980) (threats of termination together with surveillance violated Section 1 of the Sherman Act); *Arnott v. American Oil Co.*, 609 F.2d 873, 884-85 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (use of probation and termination to gain adherence to price directives constited an unlawful combination); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) (withholding price supports because of competing dealers' complaints, together with price suggestions which implied that adherence to suggested prices was necessary to receive price supports, established the requisite contract, combination or conspiracy).

allocation scheme clearly established a "contract, combination or conspiracy" under Section 1 of the Sherman Act. If a conspiracy is not found under the facts of this case, then a conspiracy can never exist between a supplier and its customers under Section 1 of the Sherman Act.

The Sixth Circuit held that there was no contract, combination or conspiracy since Chrysler needed no agreement from ILG or other customers to accomplish its aim of allocating bids in the sale of Chrysler compatible parts to the government. Relying on *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981), the court held that, since Chrysler could have achieved its aim unilaterally, the fact that it did coerce and threaten its customers to enforce the agreement to allocate bids was of no significance.

The Sixth Circuit's reliance on *Barnosky* was misplaced. The narrow holding of that case must be read in context. In *Barnosky*, a gasoline supplier restricted the placement of sign poles which it provided to service station dealers, and neither sought nor needed acquiescence of its dealers to regulate the placement of the poles. If the supplier had not exercised that control, it risked losing its trademark protection. *Id.* at 78-79.

The Sixth Circuit's application of the narrow holding of *Barnosky* to the facts in this case results in a drastically revised and wholly unsupportable legal standard. Under that standard, if an appellate court believes that a particular restraint of trade is capable of being accomplished unilaterally, it is immune from antitrust scrutiny, even though the restraint was in fact accomplished pursuant to contract, combination or conspiracy. Such a standard would create an additional and heretofore unrecognized defense to a violation of Section 1 of the Sherman Act: *i.e.*, if a defendant can show that it could possibly have accomplished its aim by itself, it will not be liable under Section 1 of the Sherman Act even though it actively sought and obtained the acquiescence of others.

Here, Chrysler actively sought and obtained the cooperation and agreement of its customers to allocate bids on the sale of parts to the government. The fact that Chrysler may

have been able to achieve its objectives without seeking and achieving the cooperation of its customers is irrelevant when it in fact sought and obtained acquiescence through coercion. In this regard, *Barnosky* is clearly distinguishable, and the Sixth Circuit's opinion herein is a patent deviation from the established law of this Court regarding conduct which is actionable under Section 1 of the Sherman Act. This Court should grant review of the Sixth Circuit's decision in order to reestablish the validity of *Parke Davis* and its progeny and to disapprove the creation of a new and unwarranted defense under Section 1 of the Sherman Act.

II

THE SIXTH CIRCUIT'S REQUIREMENT THAT PETITIONER PROVE A RELEVANT MARKET IN ACCORDANCE WITH SECTION 2 MONOPOLY STANDARDS EXEMPLIFIES THE WIDESPREAD CONFUSION WHICH NOW EXISTS IN THE APPELLATE COURTS REGARDING THE PROOF NECESSARY TO ESTABLISH A "RULE OF REASON" VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

Over plaintiffs' objection, the district court charged the jury that plaintiffs had the burden of proving a "relevant market" before the jury could find an adverse effect upon competition. (Tr. 1745-50.) The court defined "relevant market" in terms derived from Sherman Act Section 2 monopoly analysis, relying, *inter alia*, upon this Court's decision in *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), a Section 2 case. Plaintiffs objected to the jury charge on the basis that a "relevant market" showing paralleling Section 2 requirements is not a required element of a Section 1 rule of reason claim. (Tr. 1765.)

The Sixth Circuit, without comment or analysis, stated that one of the elements a plaintiff must prove in a rule of reason case is that the conspiracy produce anti-competitive effects "within relevant product and geographical markets." *ILG v. Chrysler*, 884 F.2d at 907. The concurring opinion explicitly approved the trial court's rejection of the

relevant market to which ILG was able to prove Chrysler's bid restraints were directed, *i.e.*, the sale of parts suitable for use in Chrysler vehicles and purchased by the United States government. *Id.* at 910.

The lower courts' treatment of this aspect of ILG's Section 1 claim illustrates the confusion that exists among the federal courts as to the necessary elements of conspiracy to restrain trade. The difference in the proof necessary to establish an unreasonable restraint under a Section 1 rule of reason analysis and the standard for proving the existence of a monopoly under Section 2 of the Sherman Act was well articulated by the Tenth Circuit:

> To inquire into market power in rule of reason cases is not to involve a section 2 monopolizaton inquiry. In monopolization cases the court searches for the degree of market power possessed by a firm with an extremely large market share.... Under the rule of reason, a more modest degree of power is sufficient. Therefore, any concern that the market definition may overstate power may be assuaged by attributing less significance to the market share possessed.

Board of Regents of University of Okla. v. NCAA, 707 F.2d 1147, 1159 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984) (citations omitted). Similarly, the Third Circuit, although it held that a form of "relevant market inquiry" was appropriate in both Section 1 and Section 2 claims, distinguished between them:

> The relevant market inquiry under Sections 1 and 2 is not identical.... 'The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. Section 1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable.'

Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 148 n. 13 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), *quoting Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 n.11 (3rd Cir.), *cert. denied*,

439 U.S. 876 (1978).

The conflict among the circuits on this point is manifest. Other federal appellate courts seem to agree with the Sixth Circuit that a Section 2 "relevant market" must be established to prove a violation of Section 1. *See, e.g., Fishman v. Estate of Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986) ("claims of monopolization under section 2 of the Sherman Act, as well as section 1 claims analyzed under the Rule-of-Reason, require the trier of fact to delineate the 'relevant market'"); *Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306, 319 (5th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (a Section 2 showing of relevant market is necessary to assess anti-competitive effects in rule of reason analysis under Section 1); *T.V. Signal Co. v. AT&T*, 617 F.2d 1302, 1309 n.8 (8th Cir. 1980) (court disagreed with plaintiff's assertion that there is no requirement of proof of "relevant market" under Section 1 of the Sherman Act as there is under Section 2; "where the Rule-of-Reason governs in section 1 cases, proof of relevant market is necessary to demonstrate the unreasonableness of the restraint").

This confused state of the law requires the intervention of this Court and a more definitive statement of what must be proved by a Section 1 plaintiff in a rule of reason case. Petitioner respectfully submits that the lower courts that have held that the "relevant market" inquiry is identical under Section 1 and Section 2 of the Sherman Act have departed from the import of decisions of this Court. Nowhere has this Court held that it is necessary in a Section 1 case that a relevant market be defined and market power established under Section 2 standards.

As the Court observed over seven decades ago, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). The continuing validity of this simple formulation was reiterated in *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978) ("the inquiry mandated by the Rule of Reason is

whether the challenged agreement is one that promotes competition or one that suppresses competition"); *see also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The Court most recently has endorsed the proposition that "proof of actual detrimental effects ... can obviate the need for market power, which is but a 'surrogate for detrimental effects.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986), *quoting* 7 P. Areeda, *Antitrust Law* para. 1511 at p. 429 (1986). In that case, the Court unanimously held that the Federal Trade Commission's findings that the dentists' activities suppressed competition were supported by the evidence, even absent a definition of relevant market or evaluation of market power. The Court observed that even though the agreement at issue did not involve price-fixing, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *See id.* at 459, *quoting National Soc'y of Professional Engineers*, 435 U.S. 679, 692 (1978).[10]

The foregoing analysis is especially pertinent here, where the gravamen of ILG's Section 1 claim is that Chrysler engaged in a scheme of bid rigging or bid allocation in effectively preventing its customers from bidding against it for substantial government contracts. This Court has long held that bid rigging and bid allocation schemes constitute *per se* violations of Section 1 of the Sherman Act. *E.g., National Soc'y of Professional Engineers*, 435 U.S. at 692 (code of ethics provision prohibiting engineers from engaging in competitive bidding was *per se* illegal); *see also Swift & Co. v. United States*, 196 U.S. 375 (1905) (agreements among defendants not to bid against one another in

---

[10]The "relevant market" approach followed by the Sixth Circuit is even more rigid than the approach taken by this Court in Section 2 monopolization cases. For example, this Court has approved the use of "submarkets" in antitrust analysis. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Over petitioner's objection, the district court refused to provide the jury with a submarket instruction (Tr. 1776), and the Sixth Circuit's opinion does not consider the possibility that the sale of parts to the government could have comprised a relevant submarket, although the issue was raised on appeal.

purchase of livestock were illegal); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd and modified on other grounds*, 175 U.S. 211 (1899) (defendants' bid-rigging and bid allocation scheme held illegal without regard to reasonableness of purposes of or prices set by scheme). Likewise, federal courts of appeal have held that bid rigging and bid allocation are *per se* illegal. *See* cases cited in footnote 7, *supra*. In addition, efforts to allocate government bids have long been found to be against public policy. *See, e.g., McMullen v. Hoffman*, 174 U.S. 639 (1899).

Petitioner respectfully suggests that under the weight of legal authority, this record establishes a bid rigging and bid allocation scheme that should have been viewed as illegal *per se*.[11] However, at a minimum, ILG proved that actual detrimental effects resulted from the bid allocation scheme. It should not have been necessary for a plaintiff in a Section 1 case to prove the extent of the defendant's market power gauged by a "relevant market" established by Section 2 monopoly standards. The Sixth Circuit's holding to the contrary mandates this Court's review—both to resolve the split among the circuits and to enunciate the proper burden of proof which must be satisfied in a rule of reason case brought under Section 1 of the Sherman Act.

---

[11] The district court articulated a rule of reason standard by which the jury was instructed to consider the case. (Tr. 1742-43.) Plaintiffs objected, requesting that the jury be charged with a *per se* instruction. (Tr. 1763.) The Sixth Circuit affirmed the district court, holding that the restraints imposed by Chrysler must be judged by the criteria of the rule of reason rather than a *per se* analysis. *ILG v. Chrysler*, 884 F.2d at 906.

III

THE SIXTH CIRCUIT'S AFFIRMATION OF A DIRECTED VERDICT RULING FOLLOWING TRIAL OF A "RULE OF REASON" CASE IN WHICH THE JURY FOUND THAT THE DEFENDANT SUPPLIER ENTERED INTO A CONTRACT, COMBINATION OR CONSPIRACY TO UNREASONABLY RESTRAIN TRADE OR COMMERCE IN THE SALE OF PARTS TO THE GOVERNMENT WAS A DEPARTURE FROM ACCEPTED JUDICIAL PROCEDURE WARRANTING INTERVENTION OF THIS COURT.

This Court has clearly enunciated the standards to be applied by the lower courts in ruling on motions for directed verdict. "The trial judge must direct a verdict only if, under the governing law, there can be but one reasonable conclusion as to the verdict.... If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An appellate court, reviewing a judgment entered on a directed verdict, must decide the question *de novo:* "The Court of Appeals [is] bound to view the evidence in the light most favorable to [the non-moving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962); accord,* 9 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2524 at 543-44 (1971) (in determining sufficiency of the evidence on a motion for directed verdict, "the court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of the jury") (footnotes omitted).

There can be no question but that the district court, and the court of appeals, in turn, went beyond the standards developed by this Court for the proper use of directed verdict rulings. As shown in the Statement of the Case, ILG came forward with significant probative evidence to support its Section 1 claim against Chrysler. In responding to special

interrogatories requested by the defendant, the jury found that Chrysler had engaged in a contract, combination or conspiracy with its customers to restrain trade in the sale of parts to the government. This finding was made even though the jury was given a supplemental conspiracy instruction based on the Sixth Circuit's holding in *Barnosky*.[12] Moreover, in response to another instruction taken from Section 2 monopoly cases,[13] the jury found that "there [does] exist a relevant market, as alleged by plaintiffs, consisting of parts suitable for use in Chrysler vehicles and purchased by the United States government." (Tr. 1934; App. D.) The jury also found that the contract, combination or conspiracy was "an unreasonable restraint of trade in the alleged government market." (App. D.)

---

[12] During its deliberations, the jury asked the following question:

> Your Honor, assume that we, the jury, agreed that Government business as it relates to this case is a relevant market. Assume that we, the jury, agree that Chrysler coerced some of its customers into not bidding on Government contracts in certain circumstances. Would the fact that Chrysler could possibly have accomplished the same thing by itself (i.e., by simply refusing to quote or sell to those wholesalers or raising its prices to the level that it would price those bidders out of the market) be relevant? Does it mean Chrysler would not be guilty of conspiracy under the Sherman Act? J. Staley, Foreperson.

(Tr. 1821.) At Chrysler's urging, and over petitioner's objection, the district court instructed the jury:

> Well, the answer to that question is yes, it is relevant. There is a charge right on that. I gave you that law.

(Tr. 1838.)

[13] The lengthy instruction on "relevant market" provided, in part:

> Plaintiffs have the burden of proving a relevant market or markets.
>
> * * *

(Footnote continued on next page.)

These special rule of reason interrogatories were inherently fact questions. In disregarding the jury's answers, the Sixth Circuit simply ignored the jury's special role in the resolution of contested fact issues. *E.g., Berry v. United States*, 312 U.S. 450, 452-53 (1941) (it is the "exclusive power of juries to weigh evidence and determine contested issues of fact") (footnote omitted); *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (the ultimate determination of issues of fact by the jury is not to be interfered with); *Thor Power Co. v. Weintraub*, 791 F.2d 579, 585 n.2 (7th Cir. 1986) ("contested issues of fact are best left to the jury"); *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1178 (5th Cir. 1979) ("the jury *ultimately* determines issues of fact if they cannot be settled by the parties or determined as a matter of law") (emphasis in original). The Sixth Circuit's ruling is in conflict with other federal courts of appeals rulings that the determina-

---

(Footnote continued from previous page.)

> It is your job, members of the jury, to decide from the evidence that you have heard in this courtroom whether the plaintiffs have correctly identified relevant markets. Defining such a market is a necessary first step in proving whether there has been any effect at all on competition.
>
> • • •
>
> Now, with respect to the proposed market for parts sold to the Government, members of the jury, your task is similar, it is proper to consider whether an increase or decrease in the price charged to other owners of Chrysler vehicles will have an effect or not on the price that the Government pays for the parts that it buys. By the same sign, it is proper to consider whether an increase or a decrease in the price that the Government pays for its parts will have an effect on the price paid for parts by other Chrysler dealers.
>
> • • •
>
> So, members of the jury, if you conclude the plaintiffs have not defined a relevant product market, then you must find for Chrysler, because the law is that competition can only be affected one way or the other in a relevant market.

(Tr. 1745-53.)

tion of a relevant market is a question of fact properly reserved to the jury. *See Ad-Vantage Tel. Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1341 (11th Cir. 1987); *Syufy Enterprises v. American Multicinema, Inc.*, 783 F.2d 878, 882 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 82 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).[14]

As set forth in the Statement of the Case, the trial record furnished abundant evidence to support the jury's findings that Chrysler was a party to a contract, combination or conspiracy to restrain trade (Interrogatory No. 1), that the sale of parts to the government was a relevant market (Interrogatory No. 3), and that the conspiracy in which Chrysler was engaged did constitute an unreasonable restraint of trade in the government market (Interrogatory No. 5). By ignoring the jury's answers to special interrogatories, the Sixth Circuit treated the relevant fact issues essentially as matters of law, and failed to view the evidence in the light most favorable to ILG. This departure from traditional standards governing use of directed verdicts warrants the intervention of this Court.

---

[14] A number of cases have held that government purchases of a particular product constitute a relevant market for purposes of antitrust analysis. *E.g., National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1022 (8th Cir. 1985) (relevant customer market was the United States Tax Court); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1054 (9th Cir.), *cert. denied*, 464 U.S. 869 (1983) (relevant product market was F-18 weapon systems purchased solely by government); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 717 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 621 (2nd Cir. 1969) (supplier sought to keep federal government business for itself); *United States v. Klearflax Linen Looms*, 63 Supp. 32, 42 (D. Minn. 1945) (defendant was guilty of monopolizing sales of linen rug material to the government).

IV

THE SIXTH CIRCUIT'S SUBSTANTIAL RELIANCE UPON DEPARTMENT OF JUSTICE VERTICAL RESTRAINT GUIDELINES THAT HAVE BEEN EXPRESSLY REPUDIATED BY CONGRESS WAS AN ABUSE OF FEDERAL JUDICIAL POWER, MANDATING REVIEW BY THIS COURT IN THE EXERCISE OF ITS SUPERVISORY AUTHORITY.

The Sixth Circuit placed substantial reliance throughout its opinion upon the Department of Justice Vertical Restraint Guidelines, 50 Fed. Reg. 6263 (1985) ("DOJ Guidelines").[15] These guidelines were issued by the Department of Justice on January 23, 1985. Less than one year after their issuance, they were expressly repudiated by the United States Congress. *See* Departments of Commerce, Justice and State, The Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1169-70 (1985). Congress stated that the "guidelines are inconsistent with established antitrust law, as reflected in Supreme Court decisions and statements of congressional intent." *Id.* at 1169.

The Joint Congressional Resolution incorporated into the Appropriation Act provided that the DOJ Guidelines:

> (1) *are not an accurate expression of the Federal antitrust laws or of congressional intent* with regard to the application of such laws to resale price maintenance and other vertical restraints of trade;

---

[15] In support of the directed verdict ruling on the government conspiracy claim, the Sixth Circuit relied upon § 2.2 of the DOJ Guidelines in holding that "dual distribution" cases, such as here where Chrysler both supplied the product and competed with its customers for sales, are to be viewed as vertical and not horizontal restraints. 884 F.2d at 906. The appellate court also relied upon § 2.1 of the DOJ Guidelines for the proposition that Chrysler's intrabrand restraints did not satisfy the "contract, combination or conspiracy" requirement, since Chrysler could have achieved its aim unilaterally without the acquiescence of its customers. *Id.* at 907.

(2) *shall not be accorded any force of law* or be treated by the courts of the United States as binding or persuasive; and
(3) should be recalled by the Attorney General.

Id. at 1170 (emphasis added). Thus, it is clearly against the express intent of Congress for a court to apply the DOJ Guidelines in adjudicating a case under the Sherman Act.

Not only have the DOJ Guidelines been repudiated by the United States Congress, but they have also been repudiated by other policy-making bodies. *See* Vertical Restraint Guidelines as adopted by the National Association of Attorneys General ("NAAG"), 4 Trade Reg. Rep. (CCH) para. 13,400 (1985) (NAAG rejected the DOJ Guidelines and issued its own version on December 4, 1985); Report of the American Bar Association Section of Antitrust Law, Task Force on the Antitrust Division of the U.S. Department of Justice, 57 Antitrust & Trade Reg. Rep. para. 1425 (July 19, 1989) ("the Vertical Guidelines should be withdrawn"). Under the NAAG Guidelines, Chrysler's customer bid allocation restraints would be viewed as "horizontal" and subject to *per se* analysis:

> If the intent or predominant effect of the restraint is to prevent competition for the firm in its dealer capacity, the restraint will be treated as horizontal in nature and effect.

NAAG Guidelines, 4 Trade Reg. Rep. (CCH) para. 13, 400 at 21,153-3.

The Sixth Circuit's use of the DOJ Guidelines, when use of the NAAG Guidelines would have resulted in an opposite conclusion, demonstrates why they should not be utilized by courts in deciding cases. The use of administrative guidelines that have been expressly repudiated by the legislative body which enacted the law pursuant to which the guidelines were allegedly promulgated is an abdication of a court's judicial responsibility in determining legislative intent.

The Sixth Circuit's substantial reliance on the DOJ Guidelines led to a result clearly contrary to the intent of Congress as well as established judicial precedent. This Court should exercise its supervisory authority to announce that the DOJ Guidelines, and any administrative guidelines that do not express the intent of the legislation they purport to interpret, cannot have the force of law.[16]

CONCLUSION

For all of the foregoing reasons, petitioner respectfully asks this Court to grant certiorari to review the important questions raised herein with respect to the decision of the United States Court of Appeals for the Sixth Circuit.

Dated: January 31, 1990.

ROBINS, KAPLAN, MILLER & CIRESI

James R. Safley
Counsel of Record
E. Anne McKinsey

1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500

---

[16] While a federal enforcement agency can characterize the law, it remains for Congress to make the law and for the judiciary to say "what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

INDEX OF APPENDICES

Opinion of the United States Court of Appeals for the Sixth Circuit ..... A

Findings of Fact and Conclusions of Law of the United States District Court, Eastern District of Michigan, Southern Division B-1

Judgment of the United States District Court, Eastern District of Michigan, Southern Division B-2

Order Denying Motion to Vacate Order for a Directed Verdict and for Partial Judgment on the Jury's Answers to Interrogatories of the United States District Court, Eastern District of Michigan, Southern Division B-3

Judgment of the United States Court of Appeals for the Sixth Circuit C-1

Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing *En Banc* C-2

Jury Special Interrogatories ..... D

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 88-1610

INTERNATIONAL LOGISTICS GROUP, LTD.; AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC.; GUARDIAN AUTO SUPPLY, INC.,
Plaintiffs-Appellants,

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

Argued March 23, 1989.
Decided Sept. 7, 1989.

Before KRUPANSKY and WELLFORD, Circuit Judges, and PECK, Senior Circuit Judge.

KRUPANSKY, Circuit Judge.

Plaintiffs-appellants International Logistics Group, Ltd. (ILG), Aargus Truck and Automotive Supply, Inc. (Aargus), and Guardian Auto Supply, Inc. (Guardian) have appealed from the district court's order which granted defendant-appellee Chrysler Corporation's (Chrysler) motions for summary judgment and directed verdict, disposing of the plaintiffs' antitrust action against Chrysler. ILG, Aargus, and Guardian are owned and operated through stock ownership by Theodore Henke (Henke) and engaged in buying and reselling Chrysler manufactured and compatible automotive replacement parts for use in Chrysler manufactured vehicles.

This antitrust lawsuit charged Chrysler with an alleged conspiracy to restrain trade in violation of § 1 of the Sherman Act (Count I) and with the attempted monopolization of the resale of Chrysler manufactured replacement automotive parts to Chrysler franchised dealers and to the government in violation of § 2 of the Sherman Act (Count II).[1]

After identifying the relevant product aftermarket for replacement Chrysler automotive parts as a market supplied by Chrysler and some 2,400 other independent manufactures [*sic*] and/or suppliers of compatible Chrysler replacement parts, the trial court granted Chrysler's motion for partical summary judgment on the § Sherman Act claims (Count II) concluding that appellants failed to prove that Chrysler attempted to monopolize or monopolized the product market because Chrysler's share of the identified market was limited to 20%.

On February 4, 1988, the district court granted Chrysler's motion for a directed verdict at the close of the evidence on the remaining restraint of trade violations charged under § 1 of the Sherman Act, asserting that appellants had failed to prove that Chrysler's policies imposed upon the resale of its replacement parts were designed to restrict the resale of its products, or to have an *inter*brand anticompetitive effect upon the resale of its replacement parts. On May 17, 1988, judgment was formally entered in favor of Chrysler on Count I. Appellants initiated the instant timely appeal.

Upon review of the appellant's assignments of error, the record in its entirety, the briefs of the parties, and the arguments of counsel, this court affirms the decision of the trial court for the reasons articulated here and in Judge DeMascio's opinion.

---

[1] Chrysler replacement parts are parts which are actually manufactured by Chrysler or by its licensees from Chrysler dies and fixtures. For purposes of this opinion, all such parts shall be referred to as "Chrysler manufactured parts."

Appellants' characterization of Chrysler's marketing policies for its Power Master engines as per se violations of §§ 1 and 2 of the Sherman Antitrust Act is misplaced. The record disclosed that the implemented marketing policies were "vertical" nonprice restraints imposed by Chrysler upon its distributors' marketing policies that were directed to competitors at different levels of competition. Although some minimal horizontal competitive effects may have resulted, the marketing policies concerning the Power Master engine were not directed toward or designed to impose restraints upon parties at the same competitive level even though Chrysler, the manufacturer, was also a distributor. *Business Elec. Corp. v. Sharp Elec. Co.*, 485 U.S. 717, 108 S. Ct. 1515, 1522-23 & n.4, 99 L. Ed. 2d 808 (1988).

Appellants' arguments have been rejected by current legal pronouncements addressing the subject, including the Department of Justice, which has stated in its vertical restraint guidelines:

> Some companies choose total vertical integration into distribution rather than reliance on contracts with independent distributors, and, in such cases, vertical integration may well be more efficient and lead to lower prices to consumers.
>
> * * *
>
> Situations involving dual distribution have sometimes erroneously been characterized as horizontal, and subjected to a per se analysis, because the supplier also acts as dealer. However, the fact that a supplier also engages in distribution does not make a restraint "horizontal." Accordingly, vertical restraints involving dual distribution will be analyzed in the same manner as other vertical restraints.

Department of Justice, Vertical Restraint Guidelines, § 2.2, 50 Fed. Reg. 6263, 6265 (1985) [hereinafter DOJ, Vertical Restraint Guidelines]. *See also Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 751, 98 L. Ed. 2d 763 (1988).

Accordingly, the vertical restraints imposed by Chrysler's marketing policies must be judged by the criteria of a "rule of reason" analysis rather than the rubic [*sic*] of "per se" illegality.

Integral to a "rule of reason" analysis is a review of the evolution of the controversial marketing policies.

Interparts, a division of Chrysler, marketed the Power Master engine exclusively for the international market. In an effort to remain competitive in this market, Interparts sold Power Master engines for export and internationally at unit prices which were substantially below the domestic unit price of the engine. During July through September of 1981 appellants Aargus and ILG purchased Power Master engines from Chrysler's Interparts division at overseas prices ostensibly for export and overseas resale. However, instead of exporting the engines appellants Aargus and ILG sold them to their sister corporation, appellant Guardian, a Henke corporation, which resold the engines to Chrysler dealers at prices substantially below Chrysler's prices to its domestic dealers.

Subsequent to Chrysler's numerous efforts to induce Henke and his corporations to conform with Chrysler's Power Master export program and to desist from reselling the discounted export units to Chrysler domestic dealers which Henke refused to do, Chrysler and Interparts cancelled all orders for Power Master engines from Henke-owned corporations.

Applying the "rule of reason" analysis to determine the existence of a § 1 Sherman Antitrust violation, a plaintiff must prove (1) that the antitrust defendant contracted, combined, or conspired; (2) that the combination or conspiracy produced adverse anticompetitive effects (3) within relevant product and geographical markets; (4) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (5) that the plaintiff was injured as a proximate result of the conspiracy. *See Crane & Shovel Sales Corp. v. Bucyrus-Eric Co.*, 854 F.2d 802, 805 (6th Cir. 1988). In the instant case, appellants have failed to satisfy the first elements of the test and, accordingly, a directed verdict on the § 1 Sherman Actitrust claim was appropriate.

To satisfy the imposed burden of proof, appellants were required to preponderate the evidence to support a conclusion that Chrysler did not act independently in formulating and implementing its Power Master marketing policies. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L. Ed.2d 775 (1984); *Matsushita Elec. Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The record in the case at bar disclosed that the marketing policies which Chrysler attached to its Power Master engine were unilaterally formulated and uniformly implemented as to all distributors of Power Master engines with the proviso that Chrysler would reject all purchase orders from distributors who refused to comply with the marketing conditions. Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source.

Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or its distributors in formulating marketing conditions for its Power Master unit which is exclusively manufactured; consequently, no basis existed which attached credibility to a conclusion of conspiracy. There can be no conspiracy "where the actor imposing the alleged restraint does not ... need the acquiescence of the other party or any quid pro quo from him." 6 P. Areeda, *Antitrust Law* para. 1402b4, at 16 (1986).[2] Department of Justice guidelines addressing vertical restraints have approved the argument that it is

---

[2]See *Beach v. Viking Sewing Mach. Co.*, 784 F.2d 746, 750 (6th Cir. 1986)(no concerted activity existed where manufacturer merely enforced "uniform policy" which it unilaterally formulated). *See also Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988)(where manufacturer had independent motivation for terminating plaintiff distributor and did not contact competitor of plaintiff until after it had reached its decision, no antitrust conspiracy was alleged); *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092, 1094 (5th Cir. 1987)(no conspiracy existed where manufacturer formulated policy *before* it had contacts with dealers).

inappropriate to consider intraband restraints as "agreements" to conspire and manufacturers are permitted to *unilaterally* impose appropriate restraints without giving rise to a cognizable antitrust violation:

> [I]t is inappropriate to treat intraband agreements in the same manner that other horizontal agreements are treated. Such restraints can have no effect that could not also be obtained through the unilateral action of the manufaturer of the particular brands in question.

DOJ Vertical Restraint Guidelines § 2.1, at 6265. The district court properly relied upon this principle, adopted in *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 79-80 (6th Cir. 1981)(where conspirator merely exercises its "unilateral power," no antitrust "concerted action" is possible even if defendant forced others to "unwillingly acquiese" [*sic*] in defendant's restraints). Accordingly, appellants have failed to prove a conspiracy and consequently failed to satisfy the first element of the *Bucyrus-Erie* Rule of Reason analysis.

Appellants' charged § 2 Sherman antitrust violations are equally misconceived. The trial court correctly concluded that appellants failed to sustain their burden of defining and proving the relevant product market and proving that Chrysler's market share reflected monopoly power or an attempt to achieve such power. *Smith v. Burns Clinic Med. Center, P.C.*, 779 F.2d 1173, 1176 (6th Cir. 1985). Recently, the Supreme Court admonished that "[r]etail market power ... should not be assumed but rather must be proved." *Business Elec.*, 108 S.Ct. at 1521 n.2. In particular, existing legal pronouncements have instructed that the relevant product market must include "those products or services that are either (1) identical to or (2) available substitutes for the defendants' product or service." *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983) (quoted in *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986)). Thus, as the district court concluded, appellants' burden was to present evidence that no reasonable substitutes "for parts for use by Chrysler dealers" were available. *See City of Cleveland v. Cleveland*

Elec. Illuminating Co., 538 F.Supp. 1306, 1310 (N.D. Ohio 1980)(if products have interchangeable uses, they are in the same product market).

Obviously, Chrysler's sales to its dealers must be immediately excluded from the definition of relevant product market in the instant case. Chrysler could have unilaterally required its franchised dealers to purchase their parts exclusively from Chrysler. Thus the dealer market existed at Chrysler's option. Chrysler could not be charged with restraining trade in this market. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S. Ct. 1574, 94 L. Ed. 2d 765 (where a monopolist permits competition to exist and later refuses to allow competition, no antitrust liability is generated). Moreover, a manufacturer cannot be charged with antitrust violations if it monopolizes its own brand, e.g., monopolization of Power Master engines or Chrysler manufactured parts. A manufacturer is entitled to the benefits of maintaining a "monopoly" over products which it has developed and produced. Indeed, if manufacturers were denied a monopoly over their own unique products, the incentives for innovation and development of beneficial products would be stifled. Accordingly, Chrysler committed no § 2 Sherman Act violation when it implemented its marketing programs for its Power Master engines or its own manufactured parts. Monopolization of a single brand is not an antitrust violation. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984)(absent exceptional market conditions, one brand in market of numerous brands cannot constitute relevant product market); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244-45 (6th Cir. 1982)(Chrysler products are not relevant market); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1228 (19th Cir. 1986). As the Department of Justice noted:

> [A]pplication of this market definition procedure normally will lead the Department to include more than a single brand of a product in the market. In most cases, there is significant competition among

> competing brands of a product, and defining a product market to correspond to a single brand of a product would yield unrealistic answers to the Department's economic analysis.

DOJ Vertical Restraint Guidelines § 6.1, at 6272.

For the reasons hereinbefore discussed and those articulated by the trial court, appellants' antitrust charges anchored in Chrysler's edict to dealers and distributors that it would terminate all sales of Power Master engines and Chrysler manufactured parts to its dealers and/or distributors who entered competitive bids with it for the sale of Chrysler manufactured parts to the government do not rise to the level of cognizable § 1 and § 2 Sherman antitrust action.

This court finds no merit in appellants' effort to declare the government, as a purchaser of Chrysler manufactured replacement parts, a separate geographic market which was monopolized or was attempted to be monopolized by Chrysler through its sales policies in violation of § 2 of the Sherman Antitrust Act.

The record reflected that the government's specifications incorporated into its invitation to bid for replacement vehicle parts embraced Chrysler manufactured and Chrysler compatible parts. Absent a government imposed distinction between Chrysler manufactured replacement parts and Chrysler compatible replacement parts, albeit the government represents a purchaser of magnitude, it is without unique characteristics that would support its consideration as a separate geographic market. Here again, appellants have failed to support their charges with proof of sufficient weight to give credibility to their assertions. *See City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F.Supp. 1306, 1310 (N.D. Ohio 1980).

The government is but a single purchaser within the overall market. As the Fifth Circuit recently noted:

> Jayco asks us to limit arbitrarily the geographic market to a single purchaser, a limitation that,

> because of Savin's large share of the government's business, would allow Jayco to assume what it must prove. As a matter of common sense a single purchaser of a product cannot generally be considered a relevant market, lest we wish to clothe each and every sale with an antitrust suit.

Jayco Systems, Inc. v. Savin Business Mach. Corp., 777 F.2d 306, 320 (5th Cir. 1985), *cert. denied*, 497 U.S. 816, 107 S. Ct. 73, 93 L. Ed. 2d 30 (1986) (footnote omitted). Likewise, the Seventh Circuit has decided that the loss of contracts with a single government purchaser is not cognizable as an antitrust injury. In *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980), the court decided as follows:

> [T]here must be some allegation of a harmful effect on a more generalized market than TVA. *See George R. Whitten, Jr. [v.] & Paddock Pool Builders, Inc., supra*, 508 F.2d [547] at 562 [1st Cir. 1974]. Otherwise the mere fact that one party bid successfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition. This would be contrary to the repeated view of the Supreme Court that the antitrust laws do "not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826, 65 S.Ct. 1545, 1548, 89 L.Ed. 1954 (1945).

This court has considered appellants' remaining assignments of error and concludes that they are without merit. Accordingly, the opinion of the district court is **AFFIRMED** in its entirely.

WELLFORD, Circuit Judge, concurring:

I concur in the opinion of Judge Krupansky, but write separately to set out and emphasize parts of the decision of Judge Robert E. DeMascio that seem to me to compel the result reached in this appeal.

II. *Section Two Sherman Act Claims*

The district court first set out the requirements imposed upon a plaintiff making a Section Two antitrust claim:

> To establish a Section 2 violation of the Sherman Act, Plaintiff must show that Chrysler has actually monopolized or has attempted to monopolize trade or commerce in a relevant market. Actual monopolization under Section 2 has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power in that relevant market. *U.S. v. Grinnell Corporation*, 384 U.S. 563, 570 (1966).
>
> In order to prove attempt to monopolize, Plaintiffs must show that Chrysler engaged in anticompetitive conduct, that it did so with specific intent to monopolize a relevant market, and that there is a dangerous probability of it succeeding in that attempt. *White & White, Inc. v. American Hospital and Supply Corp.*, 723 F.2d 495, 506-07 (6th Cir. 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982).

He discussed further the relevant product market in respect to a Section Two assertion in light of the proof developed:

> The alleged inability of competing suppliers of Chrysler compatible parts to sell to dealers does not restrict their ability to reach other retailers, because these other retailers bid for the parts in the same market as dealers. Thus, Chrysler's power in "the market" is its power in the market populated by all retailers of Chrysler compatible parts, not merely dealers.
>
> ....
>
> We conclude therefore that the most relevant market is the market for all Chrysler compatible parts sold at retail level. The existence of monopoly power in the market is ordinarily inferred from the

defendant's predominant share of business in the market. *Grinnell*, 348 U.S. at 571. In an attempt to monopolize context, on the other hand,a plaintiff must show that Defendant possesses "market power that approaches monopoly power." *Richter*, 691 F.2d at 826.

The most recent year for which complete statistics are available is 1985. In that year, American automobile owners spent a total of $57.7 billion on parts. Based on corresponding auto sales statistics, it is estimated that $6.2 billion (10.9% of the total) was spent on parts for Chrysler vehicles. The sales of "genuine" Chrysler parts, however, account for only 20.5% of the $6.2 billion spent by Chrysler owners. (The figures for previous years are similar, and show that Chrysler had slightly under a 20% market share.) *See* Rollins affidavit. Despite the fact that Chrysler was able to capture a lion's share of its dealers orders for spare parts, close to 80% of Chrysler owners were willing and able to buy spare parts that did not come from Chrysler. Chrysler competitors in the parts trade, therefore, had the far greater part of the market, even with the difficulties that allegedly hindered competiton for the business of dealers.

....

Such conduct is illegal (under Section 1) only if it is done in an agreement with others; or under Section 2, only if the actor is, or there is a dangerous probability the actor will become, a monopolist. The acts protects competition not competitors. Unilateral conduct that increases one's market shares from 15.6% to 20.5% does not threaten competition, no matter how unpleasant it might be for those competitors at whose expense the increase is achieved.

Again, in discussing the "government market" or submarket advocated by plaintiffs with regard to the Section Two cause of action, the district judge properly

concluded on the question of danger of monopolization from Chrysler that:

> Even if the Court assumes that there does exist a separate relevant market for Chrysler compatible parts that conform to Government specifications, it is clear that Chrysler neither monopolizes nor does it pose a danger of monopolizing that market. For each of the years 1984 through 1986, the Government purchased between $16.7 million and $19.7 million worth of spare parts that Chrysler could have supplied, but Chrysler in fact supplied only 21% to 24% of these totals. *See* Spornhauer affidavit. In other words, the Government is only slightly more likely than the individual Chrysler owner to buy a "genuine" Chrysler part when it needs a Chrysler compatible part.
>
> ....
>
> For whatever reason, Chrysler leaves over 60% of the business to competing suppliers of the relevant product. Of the remaining 40% of the government's business for which it competes, competitors are able to capture about one-third. Hence, over 75% of the relevant market remains for Chrysler competitors. There is, therefore, no dangerous probability of Chrysler monopolizing this market. This conclusion is reinforced by the fact that Chrysler's share of the government market is very stable, and may even be declining as a result of the government's recent emphasis on price over "quality" pursuant to the Competition in Contracting Act.

The district judge in his opinion considered all the evidence submitted at trial and delivered a thorough and reasoned analysis before concluding that either a directed verdict or a judgment should be rendered for Chrysler. I, therefore, affirm for the reasons stated by the district court. Judge Krupansky has further set out a sound basis for affirmance in which I concur.

APPENDIX B-1
IN THE
UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL LOGISTICS GROUP, LTD.; AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC.; AND GUARDIAN AUTO SUPPLY, INC.,
Plaintiffs,

Hon. Robert E. DeMascio
Case No. 85-CV-73005-DT
Case No. 85-CV-70047-DT

vs.

CHRYSLER CORPORATION,
Defendant.

Proceedings held and Findings of Fact and Conclusions of Law entered by the HONORABLE ROBERT E. DeMASCIO, United States District Judge, on Wednesday, Thursday, and Friday, April 6, 7, and 8, 1988, at the United States District Courthouse, Room 711, Detroit, Michigan, commencing at the hour of 9:30 a.m. on each of the above dates.

This lawsuit involves the manufacturing and distribution of automotive parts suitable for use in vehicles manufactured by Defendant Chrysler Corporation (Chrysler). Chrysler replacement parts are manufactured by outside vendors and then sold to Chrysler. The supply agreement between Chrysler and its 3,100 vendors provides that automotive parts manufactured by the "special tooling" required to produce "genuine" Chrysler parts may not be sold to any purchaser other than Chrysler, unless Chrysler granted permission.

The plaintiffs, three companies incorporated by their owner Mr. Theodore Henke, are in the business of distributing automotive parts. International Logistics Group (ILG) and Aargus Truck and Automotive Supply, Inc. (Aargus) were customers of Chrysler. ILG purchased Chrysler parts for resale in the overseas market. Aargus purchased Chrysler automotive parts from several of Chrysler's parts divisions. Aargus was also a MOPAR distributor. The plaintiff Guardian Automotive Supply, Inc. (Guardian) was organized by Henke in 1979. Guardian purchased automotive parts from Aargus and sold them to domestic purchasers including Chrysler dealers. In 1982, Aargus and guardian merged with ILG. ILG continued to purchase Chrysler automotive parts until 1983 when Chrysler ceased selling parts to any of the plaintiffs. The plaintiffs were still at liberty to purchase parts suitable for use on Chrysler vehicles from any other source.

In early 1981, Henke and representatives of Chrysler discussed the feasibility of selling a low cost replacement engine assembly, called the Power Master Engine. The idea was to sell an engine without certain operating parts so that those parts could be salvaged from the old engine and used on the replacement engine to reduce the cost to the consumer. Chrysler sold the Power Master Engine to Plaintiffs for export at a price detemined by the overseas market. The export price was much less than the domestic price. Chrysler learned that Aargus and Guardian were selling the Power Master Engine to domestic purchasers at a price far below the domestic price. Chrysler's dealers complained because they could not purchase the engine for the same price as Plaintiffs.

Plaintiffs' amended complaint essentially alleges three Sherman Act claims: 1) that Chrysler imposed illegal retraints [*sic*] on vendors who manufactured and sold automotive parts to Chrysler; 2) that Chrysler imposed illegal restraints on distributors who bought parts form Chrysler; 3) that Chrysler illegally mnopolized or attempted to monopolize the Dealer and Government "submarkets" for Chrysler compatible parts. The first two claims allege violations of Section 1 of the Sherman Act, and the latter

claim arises under Section 2.[1] The defendant filed a motion for summary judgment attacking each of Plaintiffs' Sherman Act claims. On November 25, 1987, we granted Defendant's motion for summary judgment on Plaintiffs' Section 2 claim (count II) and granted in part and denied in part Plaintiffs' Section 1 claim (count I). We concluded that several issues could not be disposed of on summary judgment. Accordingly, we directed Plaintiffs to proceed to trial on the issues of 1) whether Chrysler's territorial and customer restraints, if any, restrained trade; and 2) whether, through compulsion, Chrysler vendors agreed or adhered to a policy of not using their *own* tooling to supply "genuine" Chrysler parts to customers other than Chrysler or its designees.[2]

After jury selection, trial began on February 4, 1988. The evidence at trial disclosed that Chrysler sold "genuine" Chrysler parts to its customers through several different departments or divisions within Chrysler's corporate structure. Chrysler's "Interparts" Division sold parts to customers who, by agreement, were limited to reselling to overseas customers (other than the United States Government).[3] Through its "National Accounts" Program, Chrysler sold parts to National Accounts customers who by agreement could resell the parts to domestic buyers other than the United States Government, Chrysler Dealerships and MOPAR Warehouse distributors. Chrysler sold parts

---

[1] Plaintiffs' complaint also alleges violation of the Automotible Dealers' Day-In-Court Act (count III) and Michigan's "procuring cause" doctrine (count IV). Count III was dismissed by stipulation and count IV was withdrawn by Plaintiff.

[2] The automotive parts of concern here are parts suitable for use in Chrysler's vehicles. When reference is made to "genuine" Chrysler parts, it means only that Chrysler was involved in the manufacture and/or distribution of the compatible part. The distinction between "genuine" Chrysler parts and Chrysler compatible parts is relevant because the antitrust analysis applicable to a given restraint may depend upon whether the restraint pertains to the trade in a single or more than one brand of an identifiable part.

[3] Chrysler personnel referred to the International Export Parts Sales Division as "Interparts" for short.

directly to its dealers and (prior to September 1981), MOPAR Warehouse distributors. Chrysler also sold parts through its Marine and Industrial Division (M&I) and its Excess and Obsolete Parts Division (E&O). There is little question that Chrysler's first concern is for sales of its automotive parts to Chrysler dealers. It is reasonable that it should be. Chrysler relies upon its dealers to implement its entire warranty program. Chrysler purchases defective warranty parts from its dealer and the dealer then has cash to replenish the dealership inventory of spare automotive parts. MOPAR distributors were permitted to sell "genuine" parts to Chrysler dealers, as well as other domestic buyers.

In 1975, Chrysler entered into an agreement with ILG pursuant to which ILG became an "Interparts" customer and, like other customers of "Interparts," ILG was advised it could not resell these genuine Chrysler automotive parts in North America. On June 9, 1983, Interparts notified ILG that it would be terminated as an Interparts customer. Chrysler contends that it reached this decision after learning that ILG, contrary to its agreement with Chrysler, was selling or offering to sell Chrysler parts in the domestic market. Chrysler personnel called as witnesses by Plaintiff testified that it was essential that Chrysler prohibit its "Interparts" customers from reselling domestically because parts earmarked for export were sold at a greatly reduced price to compete with prices in the European market. Chrysler could sell these parts for less because export parts did not have a warranty and were packaged in bulk form for shipping. To permit the resale of these parts in the domestic market gave the Interparts customer an unfair advantage over domestic purchasers. Plaintiffs contend that ILG was terminated by Chrysler to eliminate it as competition in the domestic market.

On October 13, 1981, Chrysler canceled its entire MOPAR program and Aargus was among the distributors terminated. Chrysler concluded that the MOPAR program had become a competitor of Chrysler, rather than a channel of distribution for Chrysler automotive parts. One reason for this conclusion was that the more cheaply priced parts intended for the export market were falling into the hands

of MOPAR and National Account customers. On January 18, 1982, Chrysler informed Aargus that it was terminated as a National Accounts customer. When Chrysler terminated its MOPAR program, it formed the Parts Sales Coordination Committee (PSCC) consisting solely of Chrysler personnel to implement contractual comitments made by Chrysler customers. Customers who violated their agreements to sell within a certain channel of distribution were labeled "disruptive." Plaintiffs contend the PSCC used anti-competitive means to discipline disruptive distributors.

According to Plaintiffs, one of the PSCC's primary functions was to prevent distributors from selling "genuine" parts to dealers because Chrysler wished to profit by selling this segment of the market itself. When PSCC suspected a customer of selling parts to a dealer in violation of its agreement, it would conduct a "compliance audit" of that customer. If it was determined that a customer had sold "genuine" Chrysler parts to dealers, Chrysler would charge that customer a higher price for its parts. Alternatively, the PSCC would direct the various selling organizations within Chrysler not to sell any parts to customers who resold parts to dealers or the Government. Plaintiffs further allege that the PSCC terminated or threatened to terminate "Interparts" customers found to be reselling parts in the domestic market, contrary to their agreement.

Hence, at trial, the plaintiffs argued that Chrysler combined, conspired or agreed with its dealers, its customers and the plaintiffs themselves to prevent the plaintiffs from selling Chrysler brand replacement parts to Chrysler new car dealers and to the United States Government.[4] They claim Chrysler wanted to sell its dealers and the government

---

[4] Although our Nov. 25, 1987 order directed Plaintiffs to proceed to trial on the issue whether Chrysler's vendors were compelled or freely agreed to supply only Chrysler with parts, we find Plaintiffs abandoned this claim. Plaintiffs did not offer any evidence to establish that Chrysler conspired or agreed with its vendors to violate the antitrust laws. Hereafter, we use the generic term "agreement" for the statutory terms "combined, conspired or agreed."

directly and that it therefore tried to prevent Plaintiffs and others from competing for this business. The restraints alleged in this case are referred to in antitrust parlance as intrabrand territorial and customer allocations and their legality is to be judged under the rule of reason. *See, e.g., Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977).

After Plaintiffs rested their proofs, and again at the close of all the evidence, the defendant moved for a directed verdict. The Court took Defendant's motion under advisement. The Court indicated that it would allow the jury to deliberate so that in the event its ruling on the motion conflicted with the jury's verdict, there would be no need for a second trial if this Court's ruling was reversed by the Court of Appeals. The Court of Appeals could simply order that judgment be entered on the jury verdict. We granted Defendant's motion for a directed verdict, but the jury, however, could not return a general verdict. We first set forth our reasons for granting Defendant's motion for a directed verdict. We will then set forth our findings with respect to the jury deliberations.

I

The defendant based its motion for a directed verdict on three principal grounds. First, it argued that the plaintiffs failed to prove that Chrysler agreed with anyone to prevent Plaintiffs from selling Chrysler brand parts to dealers or to the United States Government. Secondly, Defendant argues that even if Plaintiffs could prove the requisite agreement, they failed to provide any evidence of harm to competition. Chrysler asserts that the basic deficiency in Plaintiffs' proofs is its reliance on two customer markets that are not relevant to antitrust analysis. We agree. Finally, Defendant argued that Plaintiffs did not show that Chrysler possesses sufficient market power to achieve its alleged anti-competitive objectives.

We will assume, without deciding, that a jury could find that Chrysler's so-called "rules," with respect to resale to its *dealers* were the product of coerced or voluntary agreements between Chrysler and it customers. However, Plaintiffs did

not produce evidence that these rules harmed competition in any relevant market. We further conclude that Plaintiffs did not produce any evidence that an agreement existed to prevent Plaintiffs from selling Chrysler brand parts to the Government.

Chrysler argues that the plaintiffs' theory of "coerced agreements," will not support a finding that Chrysler entered into an agreement to restrain trade because it is clear that Chrysler needed no such agreement to accomplish its purposes. This theory advanced by Plaintiffs is supported by at least three Supreme Court cases. *See, Perma Life Mufflers v. International Parts Corporation,* 392 U.S. 134 (1968); *Albrecht v. The Herald* [*sic*] *Company,* 390 U.S. 145 (1986); *U.S. v. Parke-Davis,* 362 U.S. 29 (1960). In all of these vertical restraint cases, the Court held-that the requisite Section 1 agreement could be found between the defendant and a potential plaintiff who was pressured into agreeing to adhere to a given restraint. Both the *Albrecht* theory and its use in *Perma Life* are implicitly reaffirmed in *Copperwell* [*sic*] *Corporation v. Independent Tube Corporation,* 467 U.S. 756, 764-66 & Note N9. The defendant is correct, however, that *Albrecht* is explained and distinguished in *Barnosky Oil v. Union Oil Company,* 665 F.2d 74, 79-80 (6th Cir. 1981). *Barnosky* stands for the proposition that there is no "coerced" agreement where the plaintiff's agreement would add nothing to the defendant's ability to achieve its own ends through unilateral action.

Barnosky is pertinent to the issue whether there is evidence of any agreement between Chrysler and others to prevent the plaintiffs from selling Chrysler parts to the United States Government. The plaintiff's testimony establishes that when Plaintiff ILG learned of a Government contract, it would ask suppliers capable of wholesaling the parts, including Chrysler, for quotations on the parts and the quantities specified. Up until 1981, Chrysler quoted prices and filled orders submitted by ILG on Government contracts. Starting in 1981, however, Chrysler first slowed and then stopped giving quotes on parts and quantities that corresponded to the specifications for Government contracts.

Chrysler had begun bidding on Government contracts directly, and wished to quote its prices directly to the United States Government, not ILG. ILG complains that Chrysler's refusal to quote quantities and parts intended for the Government contracts impaired its ability to compete with Chrysler for Government business. There is no evidence, however, that Chrysler ever asked the plaintiff to withdraw a bid it had already submitted, or that Plaintiffs were ever asked to refrain from selling to the Government parts that they had already purchased from Chrysler. (The testimony of Mr. Gregory Ellis of UWD, that *he* was asked to withdraw bids would have been relevant to this case only if Plaintiffs had succeeded in connecting it up with evidence of similar agreements affecting the plaintiffs' business.) There is no evidence, moreover, that Chrysler ever sought, nor needed ILG's acquiescence or anyone else's acquiescence, in order to cease quoting or selling to ILG on Government bids. The testimony of both Mr. Henke and Ms. Graham makes it clear that Chrysler merely delayed its quotations, slowed its deliveries, and then finaly [*sic*] stopped quoting altogether. These actions alone were what hampered ILG's ability to compete for Government business. Chrysler did not approach Mr. Henke and ask him not to bid on Government business, nor is there any evidence that it asked the Government to boycott ILG. It is not an antitrust violation to try to persuade a customer that a competitor is not supplying the exact product for which the customer has asked. The defendant is therefore entitled to a directed verdict in its favor on the issue of whether an agreement existed to prevent Plaintiffs from selling Chrysler brand parts to the Government. There simply is no evidence to support a finding of such an agreement.

Chrysler argues that even if Plaintiffs have shown the requisite agreements, they have not shown that the agreements have caused any harm to competition. Plaintiffs' only evidence of harm to competition is the analysis offered by their expert, Dr. Glennie, and Dr. Glennie's conclusions which are totally dependent upon his definition of the relevant markets. Dr. Glennie stated that he *could* have

attempted the analysis without first defining the relevant markets, but there is no evidence to suggest that his ultimate conclusions would have been the same if he had done so.

Dr. Glennie stated that he viewed the relevant markets to be the markets for "Chrysler compatible parts sold to new car dealers," but *not* other retailers; and the market for "Chrysler compatible parts sold to the United States Government." Since Dr. Glennie's conclusions speak only to the effect on competiton *within these markets*, his evidence is probative in the Rule of Reason analysis only if he has correctly defined the relevant market or markets.

For a proposed market to be "relevant," in an antitrust analysis, the demand by the included customers for any included product must be reasonably cross-elastic with their demand for any other included product, and not cross-elastic with products excluded. This was the holding in *U.S. v. E.I. Dupont Denemours [sic] & Co.* (the *Cellophane* case), 351 U.S. 377, 394 (1956).

In their memorandum in opposition to this motion, the plaintiffs rely heavily on *Brown Shoe v. United States*, 370 U.S. 294 (1962), and its so-called "submarket" test. However, as the Sixth Circuit pointed out in *White & White, Inc. v. American Hospital Supply Corporation*, 723 F.2d 495, 504 (6th Cir. 1982), these submarket tests are proper only as an additional (not alternative) means of bringing the most relevant market into sharper focus. *Brown Shoe* is not a license to subdivide relevant markets at will, or to ignore the more general principles stated in the *Cellophone* case.

An examination of Dr. Glennie's testimony clearly establishes that his definition of a "dealer market" is not based on any analysis of cross-elasticity, as required by the *Cellophane* case. His stated reason for excluding such customers as Sears, K-Mart, and others, was that he was only analyzing the "dealer market." This simply begs the question. If one *starts* with the assumption that "the market" consists only of dealers, one will obviously conclude that it does not include K-Mart, and others. But there must be a sound basis for this assumption, and this is what Dr. Glennie failed to offer.

The fact is that both dealers and other retailers are competing to obtain the same product (Chrysler compatible parts) to sell to the same customers (owners of Chrysler vehicles). Both the dealers and K-Mart respond to the same consumer demands, and therefore, both place the same demands on Chrysler and other suppliers of compatible parts. The dealers and K-Mart bid against each other to sell the same products to owners of Chrysler vehicles.

Plaintiff Aargus' inability to sell "genuine" parts to one class of retailers did not prevent it from selling those same parts to all other retailers; those other retailers were, in both the technical and colloquial sense, *in the market for* the same product that Aargus complained it could not sell to dealers, and they sought that product for the same reason. An assessment of the harm to competiton, therefore, must consider these competing retailers as part of the relevant market that has allegedly been injured. At the very least, their exclusion must be based on more than the mere fact that they exhibit less "brand loyalty" than the Chrysler dealers with whom they apparently compete, or that Chrysler made specially vigorous efforts to develop brand loyalty among the dealer segment of the retail trade.

We note that Dr. Glennie in response to Counsel's questions replied:

"Q Why do you conclude that the relevant market is limited to the sale of parts suitable for use in Chrysler vehicles that are purchased by ... the Chrysler dealers?

"A ... there are several reasons why I view them in the buyers' side of the market, and that is: They are people that buy the parts, they are companies, the dealerships which buy the parts, they are the group of buyers in this case, and they buy parts from suppliers, they buy parts from Chrysler and from others who sell parts for Chrysler vehicles when these vehicles are brough in to be repaired. Another reason why it seems to me appropriate to view the dealers as being the buyers in this relevant market, is that Chrysler dealers were viewed as a separate and distinct market for Chrysler parts by Chrysler

Corporation. (TR 1213-14)"

Indeed dealers are buyers, that much is apparent. But the question is whether there is any basis for including *these* buyers, but *not* others, in the definition of the market. On this point, the following excerpt from Dr. Glennie's cross-examination is enlightening:

"Q There are [buyer] pressures other than those that come from Chrysler dealers ... they come from other repair alternatives that somebody can go to; isn't that correct?

"A To the extent that they may compete against those, yes. To the extent they don't, the answer is no.

"Q It's obvious [dealers], do compete against other repair places, don't they?

"A To some extent. I am not sure how extensive the competition is.

"Q You never looked at that did you?

"A I never did study it.

"Q You got to the point of the Chrysler dealers and you stopped?

"A Of course, that is where the market was."

* * *

"Q Well, you stopped because you thought Chrysler was looking at its market, looking at Chrysler dealers, isn't that right?

"A That was a significant reason for the basis of my opinion ... that Chrysler, as a company, viewed its dealers as a market ... "

* * *

"Q Are there other factors besides Chrysler's perception of the market that you looked at?

"A Sure.

"Q What are the other factors?

"A Price."

* * *

"Q And I think we agreed ... that to the extent Chrysler tried to charge or Chrysler dealers tried to charge too much money for the part, that the people that owned Chrysler cars are going to go someplace else to get them fixed?

"A We did. That doesn't speak to the point where you would define relevant market.

"Q I thought economists defined relevant market in terms of what are all the competitive prices that you have to look to to see what holds the price down, don't you?

"A That's right, ... The market here is the market that I have defined where buyers, of course, are Chrysler dealers. [TR 1251-53]"

In other words, Sears, K-Mart and thousands of other independent retailers have no effect on the relevant market because they were not included in the relevant market; and because they have no effect, it is proper to exclude them from the definition of relevant market. We have carefully reviewed the entire transcript and this is the only construction we can put on Dr. Glennie's analysis. His analysis does not answer, but merely begs the necessary questions on the crucial issue of substitutability.

The Court has already stated our finding that there is no evidence that Chrysler acted other than unilaterally with respect to Plaintiffs' attempts to sell Chrysler brand parts to the Government. But, even if there were proof of an agreement, regarding sales to the Government, such a supposed agreement has not been shown to be unreasonable because, again, Plaintiffs' evidence of unreasonableness relies on an incorrect market definition. The plaintiffs have sought to define the relevant market as "Chrysler compatible parts sold to the Government." In support of this definition, aside from the same flawed argument that is presented with respect to the "dealer market," Plaintiffs offer evidence that the Government requires competitive bidding, that its bid

process is uniquely complex, that it accepts bids only from pre-qualified dealers, and that it has special product requirements, such as rustproofing, barcoating, and special packaging and numbering. All of these factors, Plaintiffs argue, mean that the Government is not sensitive to the same price factors that influenced the choices of typical owners of Chrysler vehicles, because the Government is quite simply not *in the market* for the same products as other typical Chrysler owners.

There are several flaws in this definition, and in our view one of these is fatal. First, Dr. Glennie admitted that he did not know, nor did he investigate, whether there are other large institutional consumers of spare part that might have requirements similar to the Government's. Dr. Glennie's failure to investigate this question stemmed not so much from a well-founded doubt that such consumers exist, as from the same faulty methodology that guided his analysis of the alleged "dealer market."

The second flaw in the analysis is that, even within a relevant market, it is always possible to find *one* consumer who will behave differently from the norm; who will buy a certain brand of sparkplug, for example, regardless of how much more it costs than the other brands. Some eccentric behavior can be ignored as long as it has no appreciable impact on overall supply and demand in a relevant market. In exceptional circumstances, if the consumer is significant enough, perhaps postulation of a separate market for that consumer would be appropriate. But a plaintiff who seeks to prove a "one consumer" market must appreciate that it is trying to establish an exception. Dr. Glennie's testimony does not show such an appreciation, but, as we have indicated, this stems from the fact he did not really deal with the issue of cross-elasticity at all before postulating the markets he undertook to analyze.

The Court asked the plaintiffs to cite any cases that might have held that the United States Government could, by itself, constitute a market. The plaintiffs cited four such cases. All of the cases are distinguishable, or do not actually stand for the proposition in question, or merely assumed a Government market by stipulation of the parties, or for the

purpose of deciding a motion for summary judgment. *Interphoto Corporation v. Minolta Corporation*, 295 F. Supp. 711, (SDNY 1969), did involve a vertical customer restriction in which the supplier sought to keep the federal government's business for itself. On the facts, then, it was very much like this case. The district court did find clear and convincing evidence of a Section 1 violation, but it never addressed the issue of whether the Government could be a separate market. It did not address this issue because it was not even applying the rule of reason to begin with. This case was decided when *United States v. Arnold Schwinn*, 388 U.S. 365 (1967), was in effect and made customer allocations per se illegal. However, *Schwinn* has since been overruled by *GTE, supra*. The plaintiffs have also cited *U.S. v. Klearflex* [*sic*] *Linen Looms*, 63 F. Supp. 32, (D.Minn. 1945). The defendant in *Klearflex*, the sole supplier of a linen rug material, had attempted to force a customer to stop bidding on sales to the Government. The complaint was that the defendant was guilty of monopolization under Section 2. Although the Government might have been the only customer for this particular material, liability did not depend on the definition of the *customer* market. The defendant was liable because it illegally exploited its monopoly in the *product* market. *Klearflex* would have been a monopolist, and its conduct illegal, regardless whether it had one or a hundred customers for its product. In *National Reporting Company v. Alderson Reporting Company*, 763 F.2d 1020, 1022 (8th Cir. 1985), the parties stipulated that the relevant geographic (i.e. customer) market was the United States Tax Court, so the Court did not review or address this issue on appeal. Finally, in *Northrop Corporation v. McDonnell Douglas Corporation*, 705 F.2d 1030 (9th Cir. 1983), relevant product market was the F-18 weapons system for military fighter planes. This, of course, was a product that only the Government could purchase. The Government was indeed the only consumer in the market for this product. This is the kind of exceptional circumstances that we believe Plaintiff in this case must show. In *Northrop*, it is true that there were no other customers for the F-18 weapons system; but neither were

there any other customers for anything that could be regarded as a reasonable substitute for this weapons system. In other words, sophisticated military weaponry is by its nature sold only to the Government. Reasonable substitutes for rustproofed, barcoated glove compartment boxes, however, *are* sold to customers other than the Government.

Even if these first two considerations do not warrant a directed verdict on the "government market" issue, there is one further, and more serious flaw, in the plaintiffs' argument. The evidence shows that the Government *does* bid against other Chrysler owners for the purchase of Chrysler compatible parts. The parts that people like Mr. Henke or Mr. Ellis sold to the Government were conformed to Government specifications, at their own facilities, Chrysler did not do the rustproofing. The independent vendor did not do the barcoating. It was companies such as the plaintiffs and UWD who did this. Chrysler only performed these services when it won a Government bid itself. Therefore, when the Government lets out a contract for, say, 1,000 rotors, and the plaintiffs seek to buy these rotors from Chrysler (or from any other suppliers), it does not matter to the supplier whether Mr. Henke wishes to sell these rotors to the Government or to the average consumer; the supplier is going to sell the exact same rotor in either case. The important point is that the Government is *not* the only party that wants that rotor. Other Chrysler owners want it as well. It is only after Mr. Henke or Mr. Ellis specially treat the part that it becomes available for sale to the Government. But the price at which the Government can obtain those same rotors is directly influenced by the supply of and demand for those same rotors available to all other Chrysler owners. It might be true that only the Government is in the market for rustproofing. But both the Government *and* all other owners of Chrysler vehicles are in the market for sparkplugs, mufflers, oil filters, rotors, carburetors and all other spare parts that are the subject of this lawsuit.

Accordingly, Chrysler is entitled to a directed verdict on the issue of reasonableness of the restrictions, if any, that

allegedly restrained the resale of Chrysler compatible parts to the U.S. Government. Since these holdings necesarily [*sic*] mean that the plaintiff cannot prevail on any theory of liability, we grant the defendant's motion for directed verdict.

II

After charging the jury we advised them that they would be required to return a general verdict on the issue of liability. On the third day of deliberations, the attorney for both sides stipulated to a list of seven special Interrogatories they wanted the jury to answer. With some reluctance we agreed to submit them to the jury. The seven questions asked whether Chrysler had been a party to the requisite contract, combination or conspiracy; whether there existed a relevant "dealer market," and "Government market"; whether Chrysler had unreasonably restrained trade in either market; and whether the plaintiffs had been injured as a result.

On Thursday, March 3, the jury indicated they were deadlocked on one of the Interrogatories, and they requested a copy of Mr. Henke's testimony. Four hours later, the jury again indicated that they were unanimous on all but one question. With the consent of both parties the Court directed the jury to answer the Interrogatories and where the answers were not unanimous to indicate the number of "yes" and "no" votes on that question. The Court indicated that if the answers provided a legally sufficient basis for the jury to return a general verdict one way or the other the Court would give the jury appropriate instructions. In view of their answers to the Interrogatories, it was clear to the Court that they were hopelessly hung and could not complete the general verdict form. The jury had been deliberating 29 hours over a period of six days.

The jury's answers revealed that they had unanimously found that Chrysler had been a party to a contract, combination or conspiracy to restrain trade; that relevant dealer and Government markets did exist; but that Chrysler had not unreasonably restrained trade in the dealer market; they had, however, unreasonably restrained trade in the

Government market. The jury could not agree whether the restraint of trade in the Government market caused injury to the plaintiffs. Five jurors found that it did, one juror insisted that it did not. After we polled the jury, we dismissed them as deadlocked.

The plaintiffs now argue that the Court should not have submitted Interrogatory #7, concerning injury, to the jury. The short answer to this contention is that the Interrogatories submitted were agreed to by the parties beforehand. Plaintiffs' attorney did not object to the question concerning injury. Moreover, Plaintiffs produced testimony at trial that went directly to this issue. One juror obviously concluded, correctly in the Court's view, that Plaintiffs remained able to compete for Government contracts and even to obtain Chrysler brand parts from others despite Chrysler's unwillingness to continue selling parts to the plaintiff. Presumably, the harm to competition that the jury found was based on evidence that Chrysler had coerced other customers (such as UWD) to withdraw bids for Government contracts.

It is significant that the first Interrogatory concerning whether "a contract, combination or conspiracy to restrain trade" existed did not distinguish between the sales to the Government and sales to dealers. The evidence of an agreement respecting the dealers, was more convincing than the evidence of agreements (harmful to *these* plaintiffs) with respect to the Government. The conclusion that Plaintiffs were not injured by restraints in the "Government market," was obviously induced by the fact that Plaintiffs could still buy Chrysler compatible and Chrysler genuine parts for sale to the Government, from sources other than Chrysler. In other words, no one but Chrysler acted, or needed to act, to prevent the plaintiffs from buying from Chrysler. It is apparent that the responses to Interrogatories 1, 3 and 5 were the result of a compromise. The questions sent in by the Foreman make this clear. When we polled the jurors, one juror asked if she could explain her answer to Interrogatory #1. We did not permit her to explain her reasons for answering the Interrogatory as she did, but it is clear that she compromised to find a contract, combination

or conspiracy. She stood fast and would not compromise to find that the agreement affected Mr. Henke's ability to bid for Government jobs. She answered "yes" to Question 1, knowing that she could achieve her result by answering "no" to Interrogatory 7, the injury question.

Plaintiffs' objection to the inclusion of Interrogatory #7 lacks merit. Plaintiffs must, during the liability phase of the trial, establish injury to their business or property that is causally related to the antitrust violation claimed. Without such a finding, Plaintiffs cannot make out a Section 1 claim. *Feldman v. Jackson Memorial Hospital,* 571 F.Supp. 1000, 1009 (S.D. Fla. 1983). The deliberations of this jury show how necessary it was to include an Interrogatory concerning injury. Without it, the jury might have found some unspecified "conspiracy, combination or agreement" and a harm to competition in the "Government market," but no relationship between the two. The inclusion of the "unreasonableness questions" was designed to preclude this result, but they were not foolproof.

It is curious that Plaintiffs also move the Court for an order setting aside the directed verdict and for entry of a partial judgment on the jury's responses to Interrogatories 1. 3 and 5. The plaintiffs do not suggest what the Court should do with the answer to Interrogatory #7. In any event, Plaintiffs' counsel was present when we entered the directed verdict and knows the only reason why the Court permitted the jury to continue its deliberations. Our decision was not dependent upon the answers to the Interrogatories. We were compelled to rule that the jury was deadlocked on the issue of liablility and could not return a general verdict. It was proper to discharge them after 29 hours of deliberations.

III

Our Order of November 25, 1987, granted Defendant's motion for summary judgment on Plaintiffs' Section 2 claim (Count II). We now set forth our findings and conclusions in support of that order. Plaintiffs' claim under Section 2 of the Sherman Act concerns Chrysler's allegedly monopolistic activities in what Plaintiffs identified as the

"dealer submarket," and the "Government submarket." Plaintiffs assert that by preventing its dealers from obtaining genuine Chrysler parts from sources other than Chrysler, Defendant monopolized or attempted to monopolize the supposed market for "Chrysler compatible parts sold to dealers." With respect to the alleged attempt to monopolize the "Government submarket," the plaintiff defined the relevant market as the market for "Chrysler compatible parts sold to the Government." Plaintiffs contend that Chrysler terminated any distributor that successfully underbid Chrysler on parts sales to the Government in order to reserve this lucrative segment of the market to itself. To further assure this result, Chrysler instituted a Government bid protest procedure. Chrysler would commonly file bid protests with the Government asserting that the low bidder on the contract was in fact supplying parts that did not meet Government specifications.

To establish a Section 2 violation of the Sherman Act, Plaintiff must show that Chrysler has actually monopolized or has attempted to monopolize trade or commerce in a relevant market. Actual monopolization under Section 2 has two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power in that relevant market. *U.S. v. Grinnell Corporation,* 384 U.S. 563, 570 (1966).

In order to prove attempt to monopolize, Plaintiffs must show that Chrysler engaged in anti-competitive conduct, that it did so with specific intent to monopolize a relevant market, and that there is a dangerous probability of it succeeding in that attempt. *White & White, Inc. v. American Hospital and Supply Corp.,* 723 F.2d 495, 506-07 (6th Cir. 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818, 823 (6th Cir. 1982).

It is incumbent upon the plaintiff to first establish the relevant market. The market Plaintiff seeks to establish should specify both the product and the boundaries, geographic or otherwise, within which the class of purchasers for the product are to be fund [*sic*]. For a proposed market to be "relevant," the demand by the included customers for any included product must be reasonably cross-elastic with

their demand for any other included product, and not cross-elastic with products excluded. *U.S. v. E.I. Dupont Denemours* [*sic*] *& Company; (Cellophane),* 351 U.S. 377, 394 (1956). Cross-elasticity measures the willingness of consumers to substitute one good for another. As the Supreme Court stated in the *Cellophane* case, *supra,* "commodities reasonably interchangable by consumers for the same purposes make up that 'part of trade or commerce,' monopolization of which may be illegal." 351 U.S. at 395. Since products supplied by the alleged monopolist are "genuine" Chrysler parts, the relevant market must include those genuine parts *and* all products that are reasonable substitutes for the purpose of the purchasers in question.

Neither party seriously argues that the products in question should be other than Chrysler compatible parts. The dispute centers on whether the market for such products can be relevantly subdivided by reference to different types of customers for these parts. The concept argued by Plaintiffs is that dealers and the Government act in markets that are separate from the presumably larger markets in which tyical [*sic*] consumers of Chrysler compatible parts act. As indicated above, we reject this concept.

We, again, consider this contention with respect to Chrysler dealers. The purchasers who ultimately decide how many Chrysler compatible parts will be sold, and whether they will be purchased from dealers or from other retailers or [*sic*], of course, the individual owners of Chrysler automobiles. The demand of dealers for Chrysler compatible parts is a function of the demand of Chrysler owners for those parts from dealers. If consumers are just as willing to substitute a rotor sold by a service station for a rotor sold by a dealer, their demand for the "two" rotors is cross-elastic. The demand of one retailer for rotors therefore will be cross-elastic with that of any other retailer. Put another way, if consumers are indifferent to who sells them their rotors, a change in the price charged to dealers will cause a change in the quantity purchased by dealers *and* non-dealers, as consumers shift their purchases to the retailers who offer the lower price. If this scenario conforms to economic reality, it follows that Chrysler compatible parts sold to

dealers and those sold to other retailers compete with each other in the same relevant market.

Defendants have submitted an uncontradicted expert opinion to the effect that automobile owners decide where to obtain parts on the basis of price, location and the quality of service. They are particularly sensitive to price differentials among the different outlets from which they can obtain parts, and are largely indifferent to whether the seller of a Chrysler compatible part happens to be a Chrysler dealer or not. *See,* Ordover affidavit. The potential consumers of the "Chrysler compatible parts available from dealers" have a demand for such parts that is almost perfectly cross-elastic with their demand for "Chrysler compatible parts available from other retailers." Dealers and non-dealers therefore compete with each other to serve the needs of the same consumers. The alleged inability of competing suppliers of Chrysler compatible parts to sell to dealers does not restrict their ability to reach other retailers, because these other retailers bid for the parts in the same market as dealers. Thus, Chrysler's power in "the market" is its power in the market populated by all retailers of Chrysler compatible parts, not merely dealers.

To support their position that dealers buy in a market distinct from other retailers, Plaintiffs rely on *Brown Shoe Company v. United States,* 370 U.S. 294 (1962). In *Brown Shoe* the Court explained that, within broad product markets;

> "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The bounaries [*sic*] of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct price, sensitivity to price changes, and specialized vendors."

id. at 325. Plaintiffs argue that Chrysler dealers should be considered part of a distinct submarket, because Chrysler sales personnel have developed distinct market strategies for dealing with these customers, and have attempted to

exclude other entities from competing for these customers. We note that *Brown Shoe*, utilized the above criteria to narrow the relevant product market from "footwear," to women's, men's and children's shoes. There was virtually no competition between these different types of shoes. An increase in the price of infants' shoes will not result in the purchase of more high-heels. Demand is not cross-elastic. *Brown Shoe*, therefore, does not stand for the proposition that one may subdivide a relevant market at will. *Brown Shoe* merely points out that the search for relevancy is a search for an actual market, not a familiar word. Failure to recognize the distinction that consumers in fact make will result in an overly broad and *irrelevant* market. At the same time, judicial invention of distinctions that consumers do not actually make will result in irrelevant narrow markets. *Cf. U.S. v. E.I. Dupont Denemours [sic] & Co.; (Cellophone)*, 351 U.S. 377 (1956) (there is no relevant market for cellophane, as distinct from other brands of flexible wrapping material). In *White & White, Inc.*, 723 F.2d at 504 (6th Cir. 1983), the Court explained "submarket criteria are merely additional considerations which permit a more precise formulation of relevant markets according to the basic standards for defining those markets ... The final object of all market analysis is the identification of the relevant market; submarket criteria brings the most relevant market into sharper focus."

We conclude therefore that the most relevant market is the market for all Chrysler compatible parts sold at retail level. The existence of monopoly power in the market is ordinarily inferred from the defendant's predominant share of business in the market. *Grinnell*, 348 U.S. at 571. In an attempt to monopolize context, on the other hand, a plaintiff must show that Defendant possesses "market power that approaches monopoly power." *Richter*, 691 F.2d at 826.

The most recent year for which complete statistics are available is 1985. In that year, American automobile owners spent a total of $57.7 billion on parts. Based on corresponding auto sales statistics, it is estimated that $6.2 billion (10.9% of the total) was spent on parts for Chrysler

vehicles. The sales of "genuine" Chrysler parts, however, account for only 20.5% of the $6.2 billion spent by Chrysler owners. (The figures for previous years are similar, and show that Chrysler had slightly under a 20% market share.) *See* Rollins affidavit. Despite the fact that Chrysler was able to capture a lion's share of its dealers orders for spare parts, close to 80% of Chrysler owners were willing and able to buy spare parts that did not come from Chrysler. Chrysler competitors in the parts trade, therefore, had the far greater part of the market, even with the difficulties that allegedly hindered competition for the business of dealers.

The Sixth Circuit has held that 30% market share is generally not sufficient to show a dangerous probability of successful monopolization. See *Richter*, 691 F.2d at 826; *see also Lektro-Vend Corporation v. Vendo Company*, 660 F.2d 255, 271 (7th Cir. 1981) ("numerous courts have found a market share of 30% or higher to be insufficient, by itself, to prove a dangerous probability of monopolization.") It is true that Plaintiffs allege not merely a 20% market share, but also specific conduct on Chrysler's part - namely, the alleged Section 1 violations. But these practices have allegedly been ongoing since 1981, and they have resulted in only incremental increases in Chrysler's share of the compatible parts market. Chrysler's share of the market for Chrysler compatible part has risen from 15.6% in 1981, to 16.3% in 1982, to 16.5% in 1983, to 18% in 1984 and to 20.5% in 1985. *See* Rollins' affidavit. No doubt Chrysler's tactics have been paying off, as these rises in sales statistics indicate. Obviously, Chrysler has taken business away from its competitors, and perhaps even forced some of them out of business. In applying the Sherman Act, however, that is only the beginning, not the end of the inquiry. Such conduct is illegal (under Section 1) only if it is done in an agreement with others; or under Section 2, only if the actor is, or there is a dangerous probability the actor will become, a monopolist. The act protects competition not competitors. Unilateral conduct that increases one's market share from 15.6% to 20.5% does not threaten competition, no matter how unpleasant it might be for those competitors at whose expense the increase is achieved.

We now examine the plaintiffs' contention that sales to the Government occur in a separate market. Plaintiffs contend that the Government does not behave like other consumers, and the special expertise is required to comply with Government bid procedures. Here again, Plaintiffs erroneously rely on an arbitrary notion of "submarkets" rejected above. Recast in proper economic terms, however, Plaintiffs' arguments can be understood to be that the Government's demand for Chrysler compatible part [*sic*] that meet bid specifications is not cross-elastic with part [*sic*] that do not meet specifications. In other words, the Government is not sensitive to even very large price differentials between parts that conform and parts that do not conform to its specifications.

Even if the Court assumes that there does exist a separate relevant market for Chrysler compatible parts that conform to Government specifications, it is clear that Chrysler neither monopolizes nor does it pose a danger of monopolizing that market. For each of the years 1984 through 1986, the Government purchased between $16.7 million and $19.7 million worth of spare part that Chrysler could have supplied, but Chrysler in fact supplied only 21% to 24% of these totals. *See* Spornhauer affidavit. In other words, the Government is only slightly more likely than the individual Chrysler owner to buy a "genuine" Chrysler part when it needs a Chrysler compatible part.

It is true that Chrysler has won about two-thirds of the bids it has entered for Government contracts. But Chrysler has chosen to submit bids in less than 40% of the instances in which the part sought was Chrysler compatible. In some instances, this was because Chrysler simply did not make the part in question. But this does not change the analysis of its power in the supposed "government market" for Chrysler compatible parts, the market that Plaintiffs have urged the Court to recognize. For whatever reason, Chrysler leaves over 60% of the business to competing suppliers of the relevant product. Of the remaining 40% of the government's business for which it competes, competitors are able to capture about one-third. Hence, over 75% of the relevant market remains for Chrysler competitors. There is, therefore,

no dangerous probability of Chrysler monopolizing this market. This conclusion is reinforced by the fact that Chrysler's share of the government market is very stable, and may even be declining as a result of the government's recent emphasis on price over "quality" pursuant to the Competition in Contracting Act. *See* Braswell affidavit, page 3.

U.S. v. Klearflex [*sic*] *Linen Looms*, 62 F.Supp. 32 (D.Minn 1945), cited by Plaintiffs, does not stand for any contrary position. In that case, a supplier was held liable under Section 2 for refusing to sell linen rug material to a company that competed with the supplier for Government contracts. The supplier in that case, however, was the sole manufacturer of a material for which there were no available substitutes. The fact of monopoly was already established, it was not the element in dispute. It was the conduct element of a Section 2 violation that was at issue. *Klearflex* stands for the proposition that Chrysler's conduct *would* violate Section 2, *if* Chrysler were a monopolist. Since Chrysler is clearly not a monopolist of Chrysler compatible parts, the case is inapposite.

We recognize that it may be very easy for Plaintiffs to compete with Chrysler in the sale of one part (specially [*sic*] if Chrysler does not even make the part), and almost impossible to compete in the sale of other parts. Lumping all parts together may obscure Chrysler's power in the relevant market for one particular part, and exaggerate its power with respect to other parts. But it is Plaintiffs' burden to establish a relevant market, and it is the Plaintiffs who have done the lumping together. Plaintiff has chosen to allege that Chrysler has attempted to monopolize the market for rotors as well as the market for door locks. The only statistics either party presents on the issue simply aggregate sales of these two very different parts. The only subdivisions Plaintiffs suggest are not between different parts, but between different customers of parts generally. In one case, the distinction between customers is irrelevant, and in the other there is no showing of an approach to monopoly power even if the distinction is granted.

For these reasons, the defendant is entitled to summary judgment on Plaintiffs' Section 2 claim.

APPENDIX B-2
IN THE
UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL LOGISTICS GROUP, LTD.; AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC.; GUARDIAN AUTO SUPPLY, INC.,

Plaintiffs,

v.

CHRYSLER CORPORATION,

Defendant.

No. 85-CV-73005-DT
No. 86-CV-70047-DT

JUDGMENT

This matter having come before the court for trial by a jury, and the defendant having moved for a directed verdict after plaintiffs rested their proofs, and again at the close of all the evidence; and the court having granted the defendant's motion for directed verdict pursuant to Findings of Fact and Conclusions of Law entered in the record;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that defendant have the verdict of no cause for action and plaintiffs' complaint is hereby DISMISSED.

Dated at Detroit, Michigan, this 17th day of MAY, 1988.

/S/ Robert E. DeMascio

Robert E. DeMascio
Senior United States District Judge

A TRUE COPY
Clerk of District Court
Eastern District of Michigan

/S/ J. Hartson

DEPUTY COURT CLERK

APPENDIX B-3

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

INTERNATIONAL LOGISTICS GROUP, LTD., AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC., and GUARDIAN AUTO SUPPLY, INC.,

Plaintiffs,

v.

CHRYSLER CORPORATION,

Defendant.

The Honorable
Robert E. Demascio
No. 85-CV-73005-DT
No. 86-CV-70047-DT

ORDER

Plaintiffs having filed a motion to vacate order for a directed verdict and for partial judgment on jury's answers to interrogatories, and the court having considered the issues presented;

NOW THEREFORE, IT IS ORDERED that plaintiffs' motion is hereby DENIED.

/S/ Robert E. DeMascio

Robert E. DeMascio
Senior United States District Judge

Dated: MAY 23, 1988

PURSUANT TO RULE 77(d), FRCivP
COPIES HAVE BEEN MAILED TO:
James R. Safley
G. Reynolds Sims
Richard Rossman
Laurence Shiekman
ON MAY 23, 1988.

/S/ J. Hartson

DEPUTY COURT CLERK

APPENDIX C-1
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-1610

INTERNATIONAL LOGISTICS GROUP, LTD.; AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC.; GUARDIAN AUTO SUPPLY, INC.,

Plaintiffs-Appellants,

v.

CHRYSLER CORPORATION,

Defendant-Appellee.

Before: KRUPANSKY and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge,

J U D G M E N T

On APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed in its entirely.

IT IS FURTHER ORDERED that Defendant-Appellee recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

Leonerd Green, Clerk

/S/ Leonerd Green, Clerk

Clerk

A True Copy.

Issued as Mandate: November 15, 1989

COSTS: APPELLEE TO RECOVER

Filing Fee	$
Printing	$204.96
Total	$

Attest:

/S/ Tom Beurriford

Deputy Clerk

APPENDIX C-2

No. 88-1610

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

INTERNATIONAL LOGISTICS GROUP, LTD.; AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC.; GUARDIAN AUTO SUPPLY, INC.,
Plaintiffs-Appellants,

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

BEFORE: KRUPANSKY and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge

FILED - November 2, 1989

LEONARD GREEN, Clerk

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/

Leonard Green, Clerk

APPENDIX D
IN THE
UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

INTERNATIONAL LOGISTICS GROUP, LTD., AARGUS TRUCK AND AUTOMOTIVE SUPPLY, INC., and GUARDIAN AUTO SUPPLY, INC.,

Plaintiffs,

v.

CHRYSLER CORPORATION,

Defendant.

The Honorable Robert E. Demascio
No. 85-CV-73005-DT
No. 86-CV-70047-DT

SPECIAL JURY INTERROGATORIES

YES or NO

Answer each question in accordance with the instructions by writing "yes" or "no" in the space provided.

1. Was Chrysler a party to a contract, combination or conspiracy with plaintiffs, other customers, or any other entity outside of Chrysler to restrain trade? **Yes**

If you answered "no" to Question 1, do not answer any further questions. If you answered "yes" to Question 1, answer Questions 2 and 3.

2. Does there exist a relevant market, as alleged by plaintiffs, consisting of parts suitable for use in Chrysler vehicles and purchased by Chrysler vehicle dealers? Yes

3. Does there exist a relevant market, as alleged by plaintiffs, consisting of parts suitable for use in Chrysler vehicles and purchased by the United States Government? Yes

If you answered "no to Questions 2 and 3, do not answer any further questions. If you answered "yes" to Question 2, answer Question 4; if you answered "yes" to Question 3, answer Question 5. If you answered "yes" to Questions 2 and 3, answer both Questions 4 and 5.

4. Was the contract, combination or conspiracy between Chrysler and plaintiffs, other customers, or any other entity outside of Chrysler an unreasonable restraint of trade in the alleged dealer market? No

5. Was the contract, combination or conspiracy between Chrysler and plaintiffs, other customers, or any other entity outside of Chrysler an unreasonable restraint of trade in the alleged government market? Yes

If you answered "no" to Questions 4 and 5, do not answer any further questions. If you answered "yes" to Question 4, answer Question 6; if you answered "yes" to Question 5, answer Question 7. If you answered "yes" to both questions 4 and 5, answer both Questions 6 and 7.

6. Did the unreasonable restraints of trade in the alleged dealer market cause injury to plaintiffs? ____

7. Did the unreasonable restraints of trade in the alleged goverment market cause injury to plaintiffs? **5-Yes**

1-No

/S/ J. Staley

Foreman

Supreme Court, U.S.
FILED
MAR 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1273

In The Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURENCE Z. SHIEKMAN
Counsel of Record
PHILIP H. LEBOWITZ
HELEN R. HAYNES
Pepper, Hamilton & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103
(215) 981-4000

PAUL R. EICHBAUER
Chrysler Corporation
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-2945

Attorneys for Respondent
Chrysler Corporation

BEST AVAILABLE COPY

25 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether this Court should review the lower court decision affirming the dismissal of Sherman Act Section 1 claims on the grounds that the plaintiff failed to prove a "contract, combination or conspiracy" and failed to prove a relevant antitrust market where the appellate court's ruling is not in conflict with any decision of this Court or any other court of appeals, the issue lacks importance to anyone other than petitioner, and modification of the lower courts' rulings on the issues raised would not alter the result reached below.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	4
I. REVIEW OF THE LOWER COURTS' RULINGS IS NOT WARRANTED BECAUSE THOSE RULINGS ARE IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND OF ALL OTHER COURTS OF APPEALS	6
A. The Lower Courts' Holdings That The "Coerced Conspiracy" Theory Does Not Apply To Cases Involving Vertical Non-price Restraints Did Not Create A Conflict With The Opinions Of This Court Or Other Appellate Courts	6
B. ILG Has Shown No Confusion With Respect To The Well-Accepted Requirement That A Sherman Act Section 1 Plaintiff Prove A Relevant Market	10

II. REVIEW BY THIS COURT IS ALSO NOT WARRANTED BECAUSE ILG HAS FAILED TO RAISE ANY ISSUES OF IMPORTANCE 14

III. REVIEW BY THIS COURT OF THE ISSUES RAISED BY ILG WOULD NOT ALTER THE RESULT BELOW BECAUSE OTHER VALID REASONS SUPPORT THE DISMISSAL OF ILG'S CHALLENGE TO CHRYSLER'S VERTICAL, NON-PRICE RESTRICTIONS . 15

CONCLUSION 18

TABLE OF AUTHORITIES

	Page
CASES:	
Albrecht v. Herald Co., 390 U.S. 145, *reh'g denied*, 390 U.S. 1018	6, 8
Barnosky Oils, Inc. v. Union Oil Co., 665 F.2d 74 (6th Cir. 1981)	10
Board of Regents of University of Okla. v. NCAA, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984)	11, 12
Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988)	*passim*
Cargill, Inc. v. Monfort, Inc., 479 U.S. 104 (1986)	16
Carib Aviation and Marine Consultants, Ltd. v. Mitsubishi Aircraft Int'l, Inc., 640 F. Supp. 582 (S.D. Fla. 1986)	7
Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978)	12
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	*passim*
Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984)	16
Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982)	11, 12
FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986)	12
FTC v. Superior Court Trial Lawyers Ass'n, 110 S.Ct. 786 (1990)	15
H & B Equip. Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)	7

	Page
International Boxing Club of New York v. United States, 358 U.S. 242 (1958)	11
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	15
Kaplan v. Burroughs Corp., 611 F.2d 286 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980)	13
L.A. Draper & Sons v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984)	13
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)	15
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	13
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	*passim*
National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978)	16
NCAA v. Board of Regents of University of Okla., 468 U.S. 85 (1984)	11
Newport Components, Inc. v. NEC Home Electronics (USA), Inc., 671 F. Supp. 1525 (C.D. Cal. 1987)	7
RCM Supply Co., Inc. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir. 1982)	13
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	15
Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953)	11
United States v. Colgate & Co., 250 U.S. 300 (1919)	7, 8
United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956)	11

	Page
United States v. Grinnell Corp., 384 U.S. 563 (1966)	11
United States v. Koppers Co., Inc., 652 F.2d 290 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981)	14
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)	7, 8
Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980)	10
STATUTES:	
10 U.S.C. §2305	14
15 U.S.C. §1	*passim*

No. 89-1273

In The Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Chrysler Corporation ("Chrysler") opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit submitted by International Logistics Group, Ltd. ("ILG"). Having failed at trial to prove either an agreement that violated the Sherman Act or a market in which trade was restrained, ILG seeks a change in the law regarding vertical non-price restraints carefully developed by the Court over the last thirteen years. *See Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

ILG's petition is fatally flawed because it has presented no special or important reasons for the granting of the writ. It has identified no actual conflict among the courts of appeals, no decision of this Court with which the Sixth Circuit's opinion conflicts, and no issue

of jurisprudential importance that this Court needs to correct or to clarify. In addition, ILG has failed to raise any issue of importance, and has failed to establish that a different ruling on the issues it raises would warrant a different result. Accordingly, ILG's petition should be denied.

OPINIONS BELOW

Chrysler is satisfied with ILG's presentation of the opinions below.

JURISDICTION

Chrysler is satisfied with ILG's presentation regarding the jurisdiction of this Court.

STATUTORY PROVISION INVOLVED

Chrysler is satisfied with ILG's presentation of the statutory provision involved.

COUNTERSTATEMENT OF THE CASE

This case involves Chrysler's unilateral refusal to sell automotive replacement parts to petitioner ILG, a customer that was caught violating the vertical non-price restrictions of Chrysler's parts export program. Those restrictions required that customers purchasing parts from Chrysler at its reduced export prices sell those parts outside the United States. The export program, part of Chrysler's overall parts marketing plan, was designed to insure an adequate supply of replacement parts to Chrysler vehicle owners located outside the United States. The lower export prices (as compared to Chrysler's higher domestic prices) both compensated distributors for the added expense of doing business

overseas and reflected market conditions in foreign countries.[1] As a condition of participating in Chrysler's export program, and paying the lower export prices, a distributor was required to agree to sell parts obtained from this program only to purchasers overseas.

In contravention of this provision of Chrysler's export program, ILG had carved an illegitimate niche for itself in the automotive parts aftermarket by buying parts from the export program at the reduced prices and reselling them at higher prices to the United States government and to domestic Chrysler dealers, who were not authorized customers for those parts. When ILG refused to cease its free-riding behavior, Chrysler, without input from or discussion with any third party, decided to stop selling parts to ILG.

ILG then commenced this action, asserting a variety of antitrust claims, including one that Chrysler's refusal to sell it parts constituted a conspiracy to restrain trade in "the sale of parts suitable for use in Chrysler vehicles to the United States government." App. B-1 at 1.[2] The averred "market" of all parts suitable

[1]Export customers generally bought Chrysler parts in bulk without warranty and incurred all costs of warehousing, shipment and distribution overseas. Parts sold at the higher domestic price carried Chrysler's warranty.

[2]In an attempt to exaggerate the importance of the issues presented by its unsuccessful lawsuit, ILG, in its Petition, described its antitrust claims as "charging respondent Chrysler with restraining trade in the sale of parts to the United States government in violation of Section 1 of the Sherman Act." (Pet. at 2 n.1). The market alleged but not proven below concerned only parts which could be used in Chrysler vehicles, a significantly smaller aspect of the government's purchasing needs. Assuming the relevance of that smaller market, given the many alternative parts sources available, Chrysler had no ability to affect government procurement practices even as to replacement parts for Chrysler vehicles.

for use in Chrysler vehicles and sold to the United States government encompasses parts manufactured and marketed by a multitude of entities. Approximately 2400 manufacturers produce parts that are suitable for use in Chrysler vehicles and another 30,000 companies are involved in getting those parts to market. While Chrysler did refuse to sell its own parts to ILG as a direct result of its unwillingness to abide by Chrysler's distribution policies, that decision was made by Chrysler acting alone. More importantly, ILG and many other companies continue to make sales to the federal government of parts suitable for use in Chrysler vehicles obtained from sources other than Chrysler.[3]

ARGUMENT

Contrary to ILG's assertions, this case does not raise any issues warranting review by this Court. Although ILG claims that its failure to prevail on its Section 1 claim evidences widespread confusion on the part of the lower federal courts regarding the necessary elements of a cause of action under Section 1, a review of the district and appellate court opinions in this case reveals that they are in total accord with this Court's Section 1 jurisprudence. The lower courts correctly held that no conspiracy is formed by a manufacturer's unilateral enforcement of its non-price restrictions, and that an antitrust plaintiff cannot show restrictions to be unreasonable without defining a relevant market in which competition was adversely affected.

---

[3]A number of ILG's government bid proposals produced at trial show that ILG bid to supply the government with Chrysler parts long after its termination by Chrysler.

ILG also claims that Chrysler's enforcement of its vertical non-price restriction, prohibiting a Chrysler export distributor from reselling parts purchased from Chrysler's export division to the United States government, raises a significant issue of national importance that this Court should review. Although ILG massively exaggerates in an effort to hold Chrysler's distribution policies responsible for what it characterizes as "military defense spending [which] has been grossly inflated and procurement practices [which have been] notoriously abused", Pet. at 11, ILG has not, and cannot, cite to any evidence in the record or otherwise that links Chrysler's policies with defense spending overruns or improper procurement activities. Instead, the record reflects that, after its termination by Chrysler, ILG continued to bid on and to win government contracts to supply parts suitable for use in Chrysler vehicles, relying on sources other than Chrysler for the parts. Thus, this case does not concern the elimination of even a single supplier of government parts in the market alleged by ILG.

Finally, ILG claims that the Sixth Circuit's "heav[y]" "rel[iance]" on the Department of Justice Vertical Restraint Guidelines "repudiated" by Congress requires review by this Court. Pet. at 25. The Sixth Circuit opinion, however, while citing the guidelines, does not depend on them for support.[4] Moreover, the guidelines have been neither rejected by this Court

[4]Those aspects of the Sixth Circuit's opinion referring to the Vertical Restraints Guidelines are fully supported by this Court's decisions in *Business Elec. Corp. v. Sharp Elec. Co.*, 485 U.S. 717 (1988), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). *See* App. A at 3, 5.

nor withdrawn by the Department of Justice. Accordingly, their citation in the Sixth Circuit opinion is neither dispositive nor controversial and does not warrant review by this Court.[5]

I. REVIEW OF THE LOWER COURTS' DECISIONS IS NOT WARRANTED BECAUSE THOSE DECISIONS ARE IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND OF ALL OTHER COURTS OF APPEALS.

A. The Lower Courts' Holdings That The "Coerced Conspiracy" Theory Does Not Apply To Cases Involving Vertical Non-price Restraints Did Not Create a Conflict With The Opinions Of This Court or Other Appellate Courts.

In considering whether ILG had carried its burden to demonstrate a "contract, combination or conspiracy" under Section 1, the trial court found no evidence of an agreement between Chrysler and other Chrysler customers that affected ILG's business, App. B-1 at 12, and no evidence of an agreement between Chrysler and the government. *Id.* at 13. Without evidence of an agreement between Chrysler and any other entity, ILG is left to rely on a "coerced conspiracy" theory, one that was first expressed as *dicta* in *Albrecht v. Herald Co.*, 390 U.S. 145, 160 n.6, *reh'g denied*, 390 U.S. 1018 (1968), in

[5]ILG also seeks review of the lower court's decision to permit the jury to continue its deliberations after granting Chrysler's motion for directed verdict. Even if there were some flaw in this procedure, it is of no significance here because the jury failed to return a verdict for either party, having been unable to reach unanimous agreement on one of the special jury interrogatories which both parties agreed was essential to ILG's prevailing on its Section 1 claim. Accordingly, there was never a jury verdict for any court either to recognize or to ignore, and submission of this issue for review is frivolous.

which the Court suggested that a plaintiff's unwilling compliance with a scheme to fix prices may provide the necessary concerted action under Section 1.[6]

Since *United States v. Colgate & Co.*, 250 U.S. 330 (1919), this Court has recognized a manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal," to "announce in advance the circumstances under which he will refuse to sell" and "to stop dealing with a [customer] for reasons sufficient to himself . . . because he thinks such dealer is acting unfairly in trying to undermine his trade." *Id.* at 307 (citations omitted). This Court has interpreted *Colgate* as permitting a supplier to announce a resale policy and bring about adherence to it by refusing to deal with customers who do not observe that policy. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 37 (1960). Chrysler's unilateral termination of ILG when it would not comply with Chrysler's non-price export restrictions was fully consistent with *Colgate*.

ILG's assertion that it entered into a "coerced conspiracy" with Chrysler by "agreeing" to Chrysler's ex-

[6]There is serious doubt whether the "coerced conspiracy" theory survives *Monsanto* in the terminated distributor context as the basis for demonstrating a Section 1 conspiracy. Since *Monsanto* requires that plaintiff rule out the possibility of unilateral action by the manufacturer, it is difficult to understand how an alleged conspiracy involving only a manufacturer and a terminated distributor can satisfy that burden. *See Newport Components, Inc. v. NEC Home Electronics (USA), Inc.*, 671 F. Supp. 1525, 1546 (C.D. Cal. 1987). *See also H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978) (distributor could not argue it agreed to be driven to financial ruin); *Carib Aviation and Marine Consultants, Ltd. v. Mitsubishi Aircraft Int'l, Inc.*, 640 F. Supp. 582, 585 n.3 (S.D. Fla. 1986) ("this Court doubts whether an unwilling co-conspirator can ever exist in a refusal to deal case").

port restrictions[7] does not take Chrysler's actions outside the protection of *Colgate* or create a conflict between the decision below and prior opinions of this Court. *Albrecht, Parke, Davis* and *Monsanto*, as well as every court of appeals decision relied on by ILG in support of its "coerced conspiracy" theory, are inapposite because each involved enforcement of a resale *price* policy, not a non-price restriction like that at issue here.[8]

The restraints at issue here simply required that a purchaser of parts from Chrysler's export group agree, as a condition of purchase, to resell the parts to overseas customers, and not to branches of the federal government or other domestic purchasers. Such restrictions are precisely the type that this Court has long characterized as vertical *non-price* restraints. *See, e.g., Business Elec. Corp.*, 485 U.S. at 739 ("[s]ometimes [under a vertical non-price restraint] a dealer must agree to sell only to certain classes of customers") (Stevens, J., dissenting); *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977) (territorial re-

[7]To the extent that ILG, through Mr. Henke, its president and sole shareholder, claims to have agreed to abide by Chrysler's restrictions as a basis for seeking refuge in the *dicta* of *Albrecht*, the evidence demonstrated that he subsequently ignored his purported "agreement" at every opportunity. Mr. Henke admitted that his companies sold export parts in the domestic market and that, even though a representative of his companies signed Chrysler's export addendum prohibiting domestic sales, Mr. Henke thought that it was not really "the deal" and that he could do whatever he wanted with the parts he bought for export. Specifically referring to government sales, Mr. Henke freely admitted that his companies never ceased making sales to the United States government because the government business "was our main business."

[8]In addition, in *Parke, Davis* and *Monsanto* there was evidence, not found here, that third parties had participated with the manufacturer in the decision to terminate a non-complying distributor.

striction imposed by manufacturer on distributor is vertical non-price restraint). The court of appeals below correctly held that "[t]he record disclosed that the implemented marketing policies were 'vertical' *nonprice* restraints imposed by Chrysler upon its distributors' marketing policies. . . ." App. A at 3 (emphasis added) (relying on *Business Elec. Corp.*, 485 U.S. at 729-30 & n.4. (1988)). Thus, the lower courts correctly applied the existing legal standard and rejected ILG's claims, finding that the challenged restrictions did not involve any price-related activities.

Having concluded that the vertical restrictions at issue did not involve any price-related activity, the lower courts followed strictly this Court's decisions in declining to find a coerced conspiracy between Chrysler and ILG. Indeed, a finding that such a conspiracy did exist in a manufacturer's straightforward enforcement of its non-price vertical marketing restrictions would clash with this Court's recent statutory interpretation. As the Court stated less than two years ago in *Business Electronics*, "[w]e have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* [regarding vertical non-price restraints] is not frustrated by related legal rules." 485 U.S. at 726. The decisions below, finding no coerced conspiracy in a manufacturer's enforcement of its non-price vertical restrictions, comport fully with this clear policy.

Even if the "coerced conspiracy" cause of action were applicable to a vertical non-price restraint, ILG could not have been part of such a conspiracy because

it never agreed to participate in the distribution system about which it complains. The trial court specifically found a lack of any evidence of an agreement between Chrysler and ILG:

> There is no evidence, however, that Chrysler ever asked the plaintiff to withdraw a bid it had already submitted, or that plaintiffs were ever asked to refrain from selling to the government parts that they had already purchased from Chrysler. . . . There is no evidence, moreover, that Chrysler ever sought, nor needed ILG's acquiescence or anyone else's acquiescence, in order to cease quoting or selling to ILG on government bids.

Id. at 12.[9] The court thus correctly held that without evidence of any agreement affecting ILG, ILG could not succeed on its Section 1 claims regarding sales to the government. *See Monsanto,* 465 U.S. at 754.

B. ILG Has Shown No Confusion With Respect To The Well-Accepted Requirement That A Sherman Act Section 1 Plaintiff Prove A Relevant Market.

ILG's claim that Chrysler conspired with it to restrain trade in the so-called "government market" was also rejected due to ILG's failure to prove that the sale of parts suitable for use in Chrysler vehicles to the United States government is a relevant market for antitrust purposes. ILG argues here that the lower courts' requirement that it prove such a market in the

---

[9]*See supra* note 7. *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 54 (2d Cir. 1980), on which ILG relies as support for the application of the *Albrecht* coerced conspiracy theory to vertical non-price restraints, states specifically that "actual adherence to prices . . . [is] required under the *Parke, Davis-Albrecht* formula." *See also Barnosky Oils, Inc., v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981) (evidence of agreement required).

context of a Section 1 claim "exemplifies the widespread confusion which now exists in the appellate courts regarding the proof necessary to establish a 'rule of reason' violation of Section 1 of the Sherman Act." Pet. at 16. Contrary to ILG's assertion, no such confusion exists.

This Court has long recognized the requirement that a plaintiff prove a relevant market as a necessary component of the required showing of an effect on competition in a Section 1 case. In *International Boxing Club v. United States*, 358 U.S. 242 (1958), for example, the government had alleged a Section 1 violation with respect to the promotion, broadcasting and televising of professional boxing contests. This Court recognized the necessity of proof of a relevant market, specifically applying the "reasonable interchangeability" standard of *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), to a Section 1 case. More recently, in *NCAA v. Board of Regents of University of Okla.*, 468 U.S. 85 (1984), in a Section 1 context, the Court held that "the correct test for determining whether college football broadcasts constitute a separate market [is] whether there are other products that are reasonably substitutable for televised NCAA football games." *Id.* at 111 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31 (1953)).

ILG points to *Board of Regents of University of Okla. v. NCAA*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984), and *Fleer Corp. v. Topps Chewing*

Gum, Inc., 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), as presenting a conflict with the opinion of the court of appeals below. Pet. at 17-18. However, both the Tenth Circuit in *Board of Regents* and the Third Circuit in *Fleer* required a Section 1 claimant to prove a relevant market. In fact, the court in *Fleer* held that "[t]he definition of a relevant product market is a necessary element of either a section 1 or 2 violation." 658 F.2d at 148 n.13 (citing *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 26-27 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978)). The only distinction between market evidence in a Section 1 and Section 2 case recognized by the courts in *Board of Regents* and *Fleer* is in the quantum of evidence which must be proffered to prove *market power*, not in the requirement of proof of a *relevant market*. Accordingly, the Tenth and Third Circuits are in accord with the other appellate courts and the courts below in requiring proof of a relevant market in a Section 1 case.

This Court's decision in *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), on which ILG relies, is not to the contrary. There, the Court, while apparently not engaging in a detailed market analysis, used a more general market approach in ascertaining an effect on competition based on a finding below of "actual, sustained adverse effects on [interbrand] competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized." *Id.* at 461. This finding necessarily required that a market be defined in order to assay the competitive consequences of the dentists'

behavior. Thus, far from supporting ILG's claims that no market proof is required in a Section 1 case, the Court's ruling confirms Chrysler's position that a market must be proven.

Indeed, the central point of *Continental T.V.* and *Business Elec. Corp.* is to abandon in the vertical distribution context any reliance on *per se* rules and to substitute a market-based analysis with a practical presumption of legality in the absence of price-related claims. Here, there was no evidence of any proscribed pricing behavior by Chrysler. Moreover, there was no evidence of a localized geographic market or that the vertical non-price restraints at issue had any adverse effect on interbrand competition. Therefore, affirmance of the trial court's entry of a directed verdict in Chrysler's favor on the ground that ILG failed to show an effect on competition in a relevant market was fully in accord with established precedent.[10]

---

[10]ILG also claims that the trial judge erred in granting a directed verdict as a result of its failure to prove a relevant market because "the determination of a relevant market is a question of fact properly reserved to the jury." In all of the cases cited by ILG, however, the court sustained the grant of a directed verdict or judgment notwithstanding the verdict on insufficient proof of relevant market. In addition, many other courts of appeals have affirmed the withdrawal of the relevant market issue from the jury. *See RCM Supply Co., Inc. v. Hunter Douglas, Inc.*, 686 F.2d 1074, 1077 (4th Cir. 1982) (reversing jury verdict in favor of plaintiff because jury's market definition unsupported by record); *L.A. Draper & Sons v. Wheelabrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984); *Kaplan v. Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980). Given this Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), it would be illogical now to restrict the use of directed verdicts to dispose of antitrust claims.

II. REVIEW BY THIS COURT IS ALSO NOT WARRANTED BECAUSE ILG HAS FAILED TO RAISE ANY ISSUES OF IMPORTANCE.

ILG further exaggerates the importance of this case by suggesting incorrectly that its claims involve government bid-rigging and abuse of procurement procedures. In particular, ILG claims that Chrysler's export restrictions, to the extent they prevent export distributors from reselling parts purchased directly from Chrysler's export group to the government, constitute an agreement to allocate bids in the sale of parts to the government.[11] Pet. at 13.

Chrysler's export restrictions, had ILG ever agreed to them, consisted solely of a requirement unilaterally imposed by Chrysler that Chrysler parts purchased directly from Chrysler would be sold only overseas. Because the products at issue below, parts suitable for use in Chrysler vehicles, were obtainable from thousands of sources other than Chrysler itself, Chrysler's termination of ILG for its failure to adhere to the restrictions had no effect whatsoever on government bidding and procurement.[12] Instead, Chrysler acted merely

[11]No court has ever found a bid-rigging agreement, which requires an agreement among or between competitors, to arise as a result of vertical restraints imposed by a supplier on its distributor. In *United States v. Koppers Co., Inc.*, 652 F.2d 290, 297 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981), in which ILG claims that a bid-rigging agreement was recognized between a supplier and a distributor, the court instead found that the defendants had agreed to the bid-rigging arrangement at issue when they were "indisputably horizontal competitors" and that their subsequent relationship as supplier/distributor did not change the initial character of their relationship.

[12]Indeed, following enactment of the Competition In Contracting Act, 10 U.S.C. § 2305, which took effect in March, 1985, Chrysler's share of government purchases fell as the government's use of lower-priced parts made by other manufacturers for Chrysler vehicles increased.

to curtail ILG's ability to free-ride on Chrysler's services by buying parts from Chrysler's export program at a price intended to compensate it for the additional costs of doing business in the export market and reselling them to the government as parts bearing Chrysler's quality assurance and warranty. Accordingly, consideration by this Court of ILG's claim against Chrysler would benefit only ILG, and the Court should deny ILG's petition for this reason as well. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (dismissing writ of certiorari as improvidently granted where issue of importance only to parties, not to public); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not granted simply "for the benefit of particular litigants").

III. REVIEW BY THIS COURT OF THE ISSUES RAISED BY ILG WOULD NOT ALTER THE RESULT BELOW BECAUSE OTHER VALID REASONS SUPPORT THE DISMISSAL OF ILG'S CHALLENGE TO CHRYSLER'S VERTICAL, NON-PRICE RESTRICTIONS.

Review by this Court of the issues raised by ILG would not alter the result below, which was properly supported by several additional conclusions of the lower courts.

First, ILG failed to prove, as required by *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984), that Chrysler had sufficient market power in a relevant market to violate the antitrust laws.[13] ILG in-

[13]This Court in *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S.Ct. 768, 782 n.19 (1990), reaffirmed the need to prove market power in a case involving non-price restraints.

troduced no evidence of Chrysler's market share in the alleged government market, thus precluding it from proving that Chrysler had the necessary market power. Because of this failure of proof, ILG could not demonstrate that Chrysler's conduct in the alleged markets was unreasonable, and Chrysler was entitled to judgment in its favor on this ground alone. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1202 (6th Cir. 1982) ("Without market power, a firm cannot have an adverse effect on competition."), *cert. denied*, 466 U.S. 931 (1984).[14]

In addition, Chrysler's enforcement of its export restrictions was unquestionably reasonable because it had no effect on competition in the alleged market. ILG's claims do not involve a restriction on its ability to sell parts suitable for use in Chrysler vehicles to whomever it chooses. At most, ILG demonstrated that Chrysler restricted its ability to purchase genuine Chrysler parts from Chrysler for resale to the government, an act that does not suppress interbrand competition. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (reasonableness

---

[14]By contrast, Chrysler presented competent evidence at trial that the appropriate market consists of sales of all parts suitable for use in Chrysler vehicles. In that market, Chrysler's share is less than 30%. As this Court has observed, a less than 30% market share is such an insubstantial market position that it cannot confer market power. *E.g.*, *Cargill, Inc. v. Monfort, Inc.*, 479 U.S. 104, 119-20 n. 15 (1986) (market share of approximately 20% insufficient to permit a firm to engage in predatory pricing).

of restriction determined by analyzing whether restriction promotes or suppresses competition).[15]

[15]The relevant market—sale of all parts suitable for use in Chrysler vehicles—is highly competitive in two respects. First, Chrysler enjoys less than 30% of the Chrysler compatible parts market, and there are countless other companies in the aftermarket. This competition limits the ability of Chrysler to engage in supra-competitive pricing and provides ILG with the opportunity to pursue what it claims to be its objective—competing with Chrysler. In addition, the presence of interbrand competition among automobile manufacturers limits the degree to which a small reduction in intrabrand competition can adversely affect competition in the market as a whole.

Moreover, the restrictions about which ILG complains are procompetitive. These restrictions generate significant efficiencies for Chrysler and the government by eliminating free-riding on Chrysler's warranty by firms like ILG, eliminating confusion with respect to the source of parts purchased by the government and insuring that parts represented to be genuine Chrysler parts truly are. Only by enforcing these restrictions can Chrysler protect the integrity of the products it provides to the government and others and ensure that its customers receive the ancillary services they need at the most economical cost.

CONCLUSION

For all of the foregoing reasons, the issues presented do not warrant review and the Petition for Writ of Certiorari should be denied.

Respectfully submitted

LAURENCE Z. SHIEKMAN
Counsel of Record
PHILIP H. LEBOWITZ
HELEN R. HAYNES
Pepper, Hamilton & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103
(215) 981-4000

PAUL R. EICHBAUER
Chrysler Corporation
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-2945

Attorneys for Respondent
Chrysler Corporation

Dated: March 7, 1990

No. 89-1273

(3)

Supreme Court, U.S.
FILED
MAR 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,

Petitioner.

vs.

CHRYSLER CORPORATION,

Respondent.

BRIEF OF 20 STATES AS AMICI CURIAE ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI

ROBERT ABRAMS
Attorney General
O. PETER SHERWOOD
Solicitor General
LLOYD CONSTANTINE*
Assistant Attorney General
Chief, Antitrust Bureau
New York State Department of Law
120 Broadway, Suite 2601
New York, New York 10271
(212) 341-2262

**Counsel of Record on Behalf of Amici States*

Of Counsel
ALAN PFEFFER
SUSAN BETH FARMER
Assistant Attorneys General

(Additional Counsel Listed Inside)

25 pp

TABLE OF CONTENTS

	Page
LIST OF COUNSEL	ii
TABLE OF AUTHORITIES	ix
INTERESTS OF THE AMICI STATES	1
ARGUMENT	2
Agreements Between A Dual Distributor And Its Distributors Are Not Always Vertical	6
An Agreement Between A Supplier And A Distributor Is Not "Unilateral" Whenever The Supplier Could Achieve The Same Result Without The Agreement	7
ILG Was Not Required to Prove That The Government Is A Market	9
CONCLUSION	12

LIST OF COUNSEL

Counsel for the State of Arkansas

JOHN STEVEN CLARK
Attorney General
JEFFREY A. BELL
Deputy Attorney General
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Counsel for the State of California

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
SANFORD N. GRUSKIN
Assistant Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
(213) 736-7515

Counsel for the State of Connecticut

CLARINE NARDI RIDDLE
Deputy Attorney General
(Acting Attorney General)
ROBERT M. LANGER
Assistant Attorney General
Chief, Antitrust Division
STEVEN M. RUTSTEIN
Assistant Attorney General
Capitol Annex, 110 Sherman Street
Hartford, Connecticut 06105
(203) 566-5374

Counsel for the State of Hawaii

WARREN PRICE, III
Attorney General
ROBERT A. MARKS
Deputy Attorney General
TED GAMBLE CLAUSE
Deputy Attorney General
Department of the Attorney General
465 S. King Street, Room 200
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for the State of Idaho

JIM JONES
Attorney General
CATHERINE K. BROAD
Deputy Attorney General
Business Regulation Division
State House
Boise, Idaho 83720
(208) 334-2400

Counsel for the State of Illinois

NEIL F. HARTIGAN
Attorney General
ROBERT RUIZ
Solicitor General
JOHN W. McCAFFREY
Senior Assistant Attorney General
CHRISTINE ROSSO
Senior Assistant Attorney General
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Counsel for the State of Indiana

LINLEY E. PEARSON
Attorney General
DONNA S. NICHOLS
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Counsel for the State of Iowa

THOMAS J. MILLER
Attorney General
JOHN R. PERKINS
Deputy Attorney General
Hoover Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5164

Counsel for the State of Kansas

ROBERT T. STEPHAN
Attorney General
MARK BROWN
Assistant Attorney General
Chief, Antitrust Division
Judicial Center — Second Floor
Topeka, Kansas 66612
(913) 296-2215

Counsel for the State of Maine

JAMES E. TIERNEY
Attorney General
STEPHEN L. WESSLER
Deputy Attorney General
Chief, Consumer and Antitrust Division
State House Station 6
Augusta, Maine 04333
(207) 289-3661

Counsel for the State of Maryland

J. JOSEPH CURRAN, JR.
Attorney General
MICHAEL BROCKMEYER
Assistant Attorney General
Chief, Antitrust Division
HARTMAN ROEHMER
Assistant Attorney General
7 N. Calvert Street, 6th Floor
Baltimore, Maryland 21202
(301) 576-6470

Counsel for the State of Minnesota

HUBERT H. HUMPHREY, III
Attorney General
STEPHEN P. KILGRIFF
Deputy Attorney General
THOMAS F. PURSELL
Assistant Attorney General
200 Ford Building
117 University Avenue
St. Paul, Minnesota 55155
(612) 296-2622

Counsel for the State of Mississippi

MIKE MOORE
Attorney General
ROBERT E. SANDERS
Special Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

Counsel for the State of New York

ROBERT ABRAMS
Attorney General
O. PETER SHERWOOD
Solicitor General
LLOYD CONSTANTINE
Assistant Attorney General
Chief, Antitrust Bureau
New York State Department of Law
120 Broadway, Suite 2601
New York, New York 10271
(212) 341-2262

Counsel for the State of North Carolina

LACY H. THORNBURG
Attorney General
JAMES C. GULICK
Special Deputy Attorney General
K.D. STURGIS
Assistant Attorney General
Department of Justice
2 East Morgan Street
Raleigh, North Carolina 27602
(919) 733-3377

Counsel for the State of Oklahoma

ROBERT H. HENRY
Attorney General
JANE F. WHEELER
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel for the State of Tennessee

CHARLES W. BURSON
Attorney General
BARRY TURNER
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-3491

Counsel for the State of Texas

JIM MATTOX
Attorney General
MARY F. KELLER
First Assistant Attorney General
LOU McCREARY
Executive Assistant Attorney General
ALLENE D. EVANS
Assistant Attorney General
Chief, Antitrust Division
DONNA L. NELSON
Assistant Attorney General
Capitol Station
P.O. Box 12548
Austin, Texas 78711
(512) 463-2100

Counsel for the State of Utah

R. PAUL VAN DAM
Attorney General
ARTHUR M. STRONG
Assistant Attorney General
Chief, Fair Business Enforcement Unit
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1331

Counsel for the State of Vermont

JEFFREY L. AMESTOY
Attorney General
JULIE BRILL
Assistant Attorney General
Pavilion Office Building
Montpelier, Vermont 05602
(802) 828-3171

TABLE OF AUTHORITIES

	Page
Cases	
Albrecht v. Herald Co., 390 U.S. 145 (1968)	8
Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)	6
Federal Trade Commission v. Superior Court Trial Lawyers Association, ___ U.S. ___, 110 S. Ct. 768 (1990)	10, 11
Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	10
Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945)	1-2
Hobart Bros. Co. v. Malcolm T. Gilliland Inc., 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973)	6-7
Marietta Packaging Co. v. Guest Supply, Inc., 1982-83 Trade Cases (CCH) ¶ 65,184 (N.D.N.Y. 1982)	7
McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1988)	2
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	9
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)	11
Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988)	10

	Page
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	8
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	8
Union Processing Corp. v. Atkin, 465 U.S. 1038 (1984)	11
United States v. A. Schrader's Sons, Inc., 252 U.S. 85 (1920)	9
United States v. A. Schrader's Sons, Inc., 264 F. 175 (N.D. Ohio 1919), *rev'd*, 252 U.S. 85 (1920)	8-9
United States v. Colgate & Co., 250 U.S. 300 (1919)	6, 8
United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956)	7
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)	9
Wilk v. American Medical Association, ___ F.2d ___, 1990-1 Trade Cases (CCH) ¶ 68,917 (7th Cir. 1990)	10

Statutes and Rules

Sherman Act § 1, 15 U.S.C. § 1	*passim*
Hart-Scott-Rodino Act § 301, 15 U.S.C. § 15c	1
Fed. R. Civ. P. 50	2
Sup. Ct. R. 10.1(a) and (c)	6
Sup. Ct. R. 37.2 and 37.5	2

	Page
Cal. Pub. Cont. Code § 10122	2
Conn. Gen. Stat. § 4b-91	2
Haw. Rev. Stat. § 103-22	2
Idaho Code § 67-5711	2
Ind. Code § 5-16-1-1.2	2
Iowa Code § 18.6	2
Md. State Fin. & Proc. Code Ann. § 13-102	2
Minn. Stat. § 471.345	2
Miss. Code Ann. § 31-7-13	2
N.Y. Gen. Mun. Law § 103	2
N.C. Gen. Stat. § 143-52	2
Okla Stat. tit. 61, § 103	2
Tenn. Code Ann. § 12-3-202	2
Vt. Stat. Ann. tit. 29, § 161	2

Other Materials

National Association of Attorneys General, *Vertical Restraint Guidelines* (1985), *reprinted in* 49 Antitrust & Trade Reg. Rep. (BNA) No. 1243 at 996 (Dec. 5, 1985)	7
R. Bork, *The Antitrust Paradox* (1978)	11

Page

Constantine, *An Antitrust Enforcer Confronts the New Economics*, 58 Antitrust L.J. 661 (1989) .. 11

Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982) 11

No. 89-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,

Petitioner,

vs.

CHRYSLER CORPORATION,

Respondent.

BRIEF OF 20 STATES AS AMICI CURIAE ON BEHALF OF PETITIONERS FOR A WRIT OF CERTIORARI

INTERESTS OF THE AMICI STATES

The Attorneys General of the Amici States[1] are the primary or exclusive public enforcers of their states' antitrust laws and represent their states and natural person citizens in federal antitrust litigation. *See* 15 U.S.C. § 15c (Attorneys General may bring *parens patriae* actions for damages under federal antitrust laws); *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439

[1] The Amici States are the States of Arkansas, California, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, New York, North Carolina, Oklahoma, Tennessee, Texas, Utah and Vermont.

(1945)(Attorneys General may bring *parens patriae* suits for injunctive relief under federal antitrust laws). The holdings of the Court of Appeals for the Sixth Circuit that all restraints imposed by a dual distributor are vertical as a matter of law, and that vertical restraints, price and nonprice, are legal *per se* if they could be accomplished unilaterally, will substantially and adversely affect the performance of the Attorneys General's duties. In addition, the Amici States and their local governments, agencies, authorities, and other subdivisions all make substantial use of competitive bidding in purchasing goods and services. Indeed, they are commonly required by statute to do so. *See, e.g.*, Cal. Pub. Cont. Code § 10122; Conn. Gen. Stat. § 4b-91; Haw. Rev. Stat. § 103-22; Idaho Code § 67-5711; Ind. Code § 5-16-1-1.2; Iowa Code § 18.6; Md. State Fin. & Proc. Code Ann. § 13-102; Minn. Stat. § 471.345; Miss. Code Ann. § 31-7-13; N.Y. Gen. Mun. Law § 103; N.C. Gen. Stat. § 143-52; Okla Stat. tit. 61, § 103; Tenn. Code Ann. § 12-3-202; Vt. Stat. Ann. tit. 29, § 161. The decision below, which insulates bid allocations between manufacturers who also distribute their goods ("dual distribution") and their distributors from coverage of the Sherman Act, is therefore of major concern to the Amici States.[2]

ARGUMENT

Because this jury case was decided on a motion for directed verdict, Fed. R. Civ. P. 50, the facts are to be interpreted with credibility decisions and reasonable inferences drawn in favor of the non-moving party. *McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988).

Petitioner International Logistics Group, Ltd. ("ILG") purchased parts manufactured by respondent Chrysler Corporation ("Chrysler") for resale. 884 F.2d at 905.[3] Chrysler also sold

---

[2] This amicus brief is submitted pursuant to Rules 37.2 and 37.5 of this Court.

[3] References to the opinions below are to the official report of the court of appeals' decision at 884 F.2d 904, and the unofficial report of the district court's opinion at 1988-2 Trade Cases (CCH) ¶ 68,127.

its parts directly to some purchasers, making it a "dual distributor." *Id.* at 906. Among the customers to whom it sold directly were its own dealers and the United States government. *Id.* at 908. According to the court below Chrysler had a special program with lower prices on parts intended to be sold for export. *Id.* at 906. ILG bought both through this program and through domestic programs. 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,870.[4]

Chrysler placed several restrictions on its distributors. It prohibited customers who purchased Power Master engines from Chrysler at export prices from selling these engines within the United States. *Id.* at 906. It prohibited its distributors from selling any parts to Chrysler franchised dealers. *Id.* at 908. Finally, Chrysler prohibited its distributors, including ILG, from competing with Chrysler for certain government contracts. *Id.* at 908. Chrysler itself refrained from bidding on certain government contracts on which it did permit its distributors to bid. Tr. 398. While ILG challenged all three of these restrictions in the courts below, the Petition for Certiorari is limited to the restraint on government sales. Petition at 2 n.1.

Chrysler did not limit itself to merely announcing a general policy respecting government sales and terminating any distributor that refused to follow it. ILG testified that Chrysler officials specifically told it not to submit bids to the government on a contract for parts to be sent to Saudi Arabia, and on another contract for transmissions. Tr. 561-63; 587-89. ILG in fact submitted bids anyway. Tr. 694. Chrysler pressured ILG to conform to its policies by, *inter alia*, slowing its deliveries to ILG and subjecting it to an audit. Tr. 515-16; 584-85. Finally, after years of unsuccessful efforts to curb ILG, Chrysler terminated it. Tr. 697.

Chrysler was more successful with other distributors. For instance, another distributor, UWD, was warned by Chrysler to withdraw a bid it had submitted on a government contract in

---

[4] These distinctions were not rigid. For a time ILG was permitted to buy parts from an export program for sales domestically. Tr. 90-93. Government sales could be either domestic or international. Tr. 910.

early 1983. UWD agreed, and Chrysler itself was awarded the contract. 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,872; Tr. 300-01; 480-85; 498-99. With another distributor, JAMCO, Chrysler inserted a provision in the written distribution agreement that JAMCO could not quote bids to the government for over $10,000.00 without Chrysler's prior written approval. Tr. 926-27; 1187; 1193-94. Indeed, Chrysler had a general practice of "counseling" with "disruptive" customers, i.e., those who violated Chrysler policies. Tr. 1129-30. Chrysler's prices to the government were higher than its prices to its distributors. Tr. 384.

Under standard antitrust law, an agreement between two competitors that one and not the other would submit a bid on a government contract constitutes collusive bid-rigging, a *per se* unreasonable restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1. The district court nevertheless directed a verdict for Chrysler on the claim. The Court of Appeals for the Sixth Circuit affirmed, finding no possible violation of the antitrust laws on these facts. The Court of Appeals reached its results in three steps[5]:

First, it held that, because the manufacturer was also a dual distributor, the restraint on trade was by law vertical and not horizontal. "Although some minimal (sic) horizontal competitive effects may have resulted, the marketing policies . . . were not directed toward or designed to impose restraints upon parties at the same competitive level even though Chrysler, the manufacturer, was also a distributor." 884 F.2d at 906. Because the

---

[5] The court devoted most of its attention to claims respecting sales in the United States of Power Master engines, but applied the identical analysis to the restraint against sales to the government. "For the reasons hereinbefore discussed and those articulated by the trial court, [ILG]'s antitrust charges anchored in Chrysler's edict to dealers and distributors that it would terminate all sales of Power Master engines and Chrysler manufactured parts to its dealers and/or distributors who entered competitive bids with it for the sale of Chrysler manufactured parts to the government do not rise to the level of cognizable § 1 and § 2 Sherman antitrust action." 884 F.2d at 908. As already noted, this is the only claim raised in the Petition for Certiorari. It is also the claim of greatest interest to the Amici States.

agreement among the parties involved allocation of bids and not price-fixing, the Court of Appeals concluded that the "vertical restraints imposed by Chrysler's marketing policies must be judged by the criteria of a 'rule of reason' analysis rather than the rubric of 'per se' analysis." *Id.*

Second, the court held that there was no "contract, combination, or conspiracy" under the Sherman Act. It presented two alternative grounds for this ruling. First, it held that compliance by the distributors with Chrysler's restrictions was not a section one agreement because it was coerced. "Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source." 884 F.2d at 907. Alternatively, it held that because Chrysler could in theory have achieved its goal without seeking the agreement of its distributors, the restraint was therefore unilateral as a matter of law. "Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or distributors in formulating marketing conditions for its [equipment]. . . ." *Id.*

Third, even if an agreement were proven, ILG's claim would still fail because ILG was required to prove a market, and government purchases subject to the competitive bidding process do not constitute a market. "[A]lbeit the government represent a purchaser of magnitude, it is without unique characteristics that would support its consideration as a separate geographic market." 884 F.2d at 909. Hence bid allocation involving the government alone, which the court characterized as "but a single purchaser within the overall market," does not constitute antitrust injury. *Id.*

The cumulative effect of these propositions is to make bid-allocation between a dual distributor manufacturer and its distributors *per se* legal. Because the manufacturer is a dual distributor, the agreement is automatically judged as a vertical restraint. Because all vertical restraints, up to and including

resale price maintenance, can also be achieved by "unilateral" action by the manufacturer, *see United States v. Colgate & Co.*, 250 U.S. 300 (1919), in the Sixth Circuit all vertical restraints are *per se* legal. Finally, even if the collusion were subject to review under the Sherman Act, it would always pass muster because collusion in sales to the government does not injure the market.

Each of these propositions flies in the face of precedent from this Court and from other circuits. Their combined effect is to revolutionize antitrust law in a direction which has no support in either law or economics. Grant of the petition for certiorari is therefore appropriate under Rules 10.1(a) and 10.1(c) of this Court.

Agreements Between A Dual Distributor And Its Distributors Are Not Always Vertical

The holding of the court below that restraints imposed by a dual distributor manufacturer are always to be treated as vertical, regardless of the market circumstances of the agreement or the role the manufacturer is actually playing in the market, is directly contrary to the directive of this Court to analyze restraints in terms of economic realities and not verbal abstractions. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 728 (1988). In particular, this Court stressed that the proper determination of whether an agreement is horizontal depends, not on its effects, but on whether it is "imposed by agreement between competitors. . . ." *Id.* at 730. The agreement here between Chrysler and UWD, JAMCO, and other distributors, that Chrysler would bid on some government contracts, and distributors on others, is manifestly an agreement between competitors. While it is true that Chrysler was also a supplier of its distributors, and in other contexts their agreements might well be vertical, it is superficial formalism to characterize *all* agreements between distributors and Chrysler as vertical. Other circuits and this Court look to the nature of the restraint in the market, not to a contractual formula, in determining whether it is horizontal or vertical. *See, e.g., Hobart Bros. Corp. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899 (5th Cir.), *cert.*

denied, 412 U.S. 923 (1973); *Marietta Packaging Co. v. Guest Supply, Inc.*, 1982-83 Trade Cases (CCH) ¶ 65,184 (N.D.N.Y. 1982); *see also United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 312-13 (1956)(dual distributor supplier is horizontal competitor of distributor under Fair Trade Laws); National Association of Attorneys General, *Vertical Restraint Guidelines* § 2.3 (1985), *reprinted in* 49 Antitrust & Trade Reg. Rep. (BNA) No. 1243 at 996, 999 (Dec. 5, 1985).[6]

The Amici States endorse the view of petitioners that the "bid allocation scheme . . . should have been viewed as illegal *per se*." Petition at 20.

An Agreement Between A Supplier And A Distributor Is Not "Unilateral" Whenever The Supplier Could Achieve The Same Result Without The Agreement

Having concluded that the restraints were vertical, the court below proceeded to apply the standards for agreements developed for vertical restraints. It concluded that section one of the Sherman Act did not apply to the agreements between Chrysler and its distributors to allocate government bids for two reasons. First, it asserted that the agreements were not covered by the Sherman Act because the distributors agreed under coercion. "Current legal precedent supports the conclusion that a conspiracy may not evolve under circumstances where a dealer or distributor involuntarily complies to avoid termination of his product source." 884 F.2d at 907. The court of appeals did not identify the legal precedents on which it relied, but the precedents of this Court are very much to the contrary. *See*

---

[6] The Vertical Restraints Guidelines of the National Association of Attorneys General ("NAAG") were adopted without dissent as the enforcement of policy of the Attorneys General at a plenary session of NAAG. NAAG is comprised of the Attorneys General of the fifty states, and American Samoa, Guam, Commonwealth of Northern Mariana Islands, Commonwealth of Puerto Rico, and the Virgin Islands. The Corporation Counsel of the District of Columbia, which at that time was not yet a member of NAAG, also adopted the Guidelines.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968) ("each petitioner can clearly charge a combination between . . . [the supplier] and other franchise dealers, whose acquiescence in [the supplier's] firmly enforced restraint was induced by 'the communicated danger of termination' "); *accord*, *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964).

The alternate holding of the court below was more far-reaching. It held that, because Chrysler did not need the acquiescence of its distributors to achieve its goal of preventing them from bidding on certain government contracts, therefore the actual agreements reached between them were "unilateral." "Moreover, under the scenario of this case, there were no legal restraints against Chrysler's unilateral acts because Chrysler needed no acquiescence from its dealers or distributors in formulating marketing conditions for its [equipment]. . . ." 884 F.2d at 907. The breadth of this holding is astonishing. All vertical restraints, including resale price maintenance, can also be achieved in some form unilaterally by the manufacturer. In *United States v. Colgate & Co.*, 250 U.S. 300 (1919), this Court held that a unilateral policy by a supplier not to sell goods to distributors that sold at prices below that set by it did not violate section one of the Sherman Act. Any type of vertical restraint could be achieved in the same way. To deduce, as the Court of Appeals did, that all such vertical restraints are therefore immune from the Sherman Act, is contrary to decades of precedent from this Court.

Shortly after the *Colgate* decision, the district court for the Northern District of Ohio dismissed an indictment charging resale price maintenance in violation of the Sherman Act on the same ground relied on by the Court of Appeals here: because the manufacturer could have achieved the same result unilaterally, it could not be liable for having achieved the same result by agreement.

> [I]t seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the opinion [in *Colgate*] and

> not violate the Sherman Anti-Trust Act; yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law.

United States v. A. Schrader's Sons, Inc., 264 F. 175, 184 (N.D. Ohio 1919); *see also United States v. A. Schrader's Sons, Inc.*, 252 U.S. 85, 92-93 (1920) (argument of defendant's counsel). This Court reversed that decision, expressly repudiating the reasoning of the court below, and reiterating that any agreement, "whether express or implied from a course of dealing or other circumstances," distinguishes a case from *Colgate*. *Id.* at 97, 99-100. This Court has continued to emphasize the significant difference between independent and concerted action under section one of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 36-47 (1960).

The Sixth Circuit was therefore incorrect when it formulated the issue in terms of whether Chrysler "needed" acquiescence from its distributors to carry out its policy. 884 F.2d at 907. The real issue is whether there was an agreement, "whether express or implied from a course of dealing or other circumstances." The Record clearly establishes that there was an agreement. Chrylser distributors refrained from bidding on certain government contracts in agreement with Chrysler.

The Amici States agree with petitioner that this Court should grant the petition for certiorari "to disapprove the creation of a new and unwarranted defense under Section 1 of the Sherman Act." Petition at 16.

ILG Was Not Required To Prove That The Government Is A Market

On the premise that the bid allocation agreements at issue here were to be judged under the rule of reason, the Sixth Circuit held that ILG had to prove, among other things, adverse effects "within relevant product and geographical markets. . . ." 884 F.2d at 907. The Court of Appeals went on to hold that

sales to the government do not constitute a market for purposes of proving a violation of the antitrust laws.[7] 884 F.2d at 908-09. Consequently, unless the government is the only purchaser of a particular product or service, collusion or allocation of bids on government purchases between a dual distributing manufacturer and distributors is not an antitrust violation.

The Amici States assert that bid-rigging, including bid allocations by a dual distributing manufacturer and its distributors, is a *per se* violation of section one of the Sherman Act. Consequently, market definition is unnecessary. *See Federal Trade Commission v. Superior Court Trial Lawyers Association*, ___ U.S. ___, ___, 110 S. Ct. 768, 781-82 (1990). However, even assuming that bid allocation of this nature is not *per se* illegal, the court below was still in error in holding that the agreement would not be unreasonable unless its market effects extended beyond government purchases.

This Court made clear in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), that market definition is simply one method of proving competitive injury, and is not necessarily required, even in an ordinary rule of reason case. "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry. . . ." *Id.* at 460-61. Other circuits have followed this Court's lead. *See, e.g., Wilk v. American Medical Association*, ___ F.2d ___, 1990-1 Trade Cases (CCH) ¶ 68,917 at 62,910 (7th Cir. 1990); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1448 (9th Cir. 1988).

---

[7] The Court of Appeals discusses market definition in the context of ILC's monopolization claims under section two of the Sherman Act. However, its discussion of market definition relies on the Vertical Restraint Guidelines of the Department of Justice, incorporates the reasons discussed by the trial court, which applied its market discussion to the section one claim, 1988-2 Trade Cases (CCH) ¶ 68,127 at 58,873-75, and refers specifically to section one as well as section two violations. 884 F.2d at 908. We conclude that the issue is therefore fairly raised for appeal.

Surely, if any case presents a clear example of "actual detrimental effects," it is bid allocation. The injury to ILG, of course, is that it was instructed to refrain from entering potentially profitable bidding competitions, and was terminated when it refused. Of particular concern to the Amici States, though, is the injury to competition for the bid, the injury to the government. "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Chrysler pressured ILG and other distributors to keep out of the bidding because it feared their bids would be lower than Chrysler's. The effect of the conspiracy was to increase the price to the government purchaser.

The anticompetitive effects of bid allocation have never been evaluated in terms of the effects on some broader market. *See Union Processing Corp. v. Atkin*, 465 U.S. 1038 (1984)(White, J., Burger, C.J., and Powell, J., dissenting from denial of certiorari). Perhaps government purchasers, except for the Defense Department strategic weapons procurement office, are, in a sense, "but a single purchaser within the overall market." 884 F.2d 909. This description, though, does not eliminate the injury done them by bid allocation, even when the bid allocation is done by a dual distributor. To conclude, as the Sixth Circuit does, that this injury is undeserving of protection under the antitrust laws because the government purchaser does not constitute a "market," totally misunderstands the true goals of the antitrust laws. *See* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65 (1982). Indeed, from an economic perspective, each different letting of a contract is a separate auction market. Constantine, *An Antitrust Enforcer Confronts the New Economics*, 58 Antitrust L.J. 661, 663 and n.8 (1989). "Thus, the fact of agreement [by the conspirators] defines the market." *Superior Court Trial Lawyers Association*, 110 S. Ct. at 781 n.18, *quoting* R. Bork, *The Antitrust Paradox* 269 (1978). The Amici States agree with petitioner that ILG should not have "to prove the extent of defendant's market power gauged by a 'relevant market' . . ." Petition at 20.

CONCLUSION

The opinion of the Court of Appeals for the Sixth Circuit departs drastically from existing antitrust law, eliminates the law of vertical restraints in the Sixth Circuit, and leaves government agencies vulnerable to bid allocation and other blatantly anticompetitive acts. The Court should grant ILG's petition for writ of certiorari.

Dated: March 7, 1990

Respectfully submitted,

ROBERT ABRAMS
Attorney General
O. PETER SHERWOOD
Solicitor General

LLOYD CONSTANTINE*
Assistant Attorney General
Chief, Antitrust Bureau
New York State Department of Law
120 Broadway, Suite 2601
New York, New York 10271
(212) 341-2262

**Counsel of Record On Behalf of Amici States*

Of Counsel
ALAN PFEFFER
SUSAN BETH FARMER
Assistant Attorney Generals

Supreme Court, U.S.
FILED
MAR 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1273

In The Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURENCE Z. SHIEKMAN
Counsel of Record
PHILIP H. LEBOWITZ
HELEN R. HAYNES
Pepper, Hamilton & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, Pennsylvania 19103
(215) 981-4000

PAUL R. EICHBAUER
Chrysler Corporation
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-2945

Attorneys for Respondent Chrysler Corporation

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE ARGUMENTS OF AMICI SHOULD BE ACCORDED NO WEIGHT BECAUSE THEY ARE BASED ON AN INACCURATE RENDERING OF THE FACTS	2
II. THE AMICI'S ARGUMENTS ARE ALSO UNPERSUASIVE BECAUSE THEY MISCHARACTERIZE THE SIXTH CIRCUIT OPINION	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981)	5
Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899)	2
Business Elec. Corp. v. Sharp Elec. Co., 485 U.S. 717 (1988)	4
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	5
Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981)	5
Culberson, Inc. v. Interstate Elec. Co., 821 F.2d 1092 (5th Cir. 1987)	6
Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984)	5
Dimidowich v. Bell & Howell, 803 F.2d 1473 (9th Cir. 1986), *modified on other grounds*, 810 F.2d 1517 (9th Cir. 1987)	5
Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981)	5
Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988)	6

Page

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 6, 7

FTC v. Superior Court Trial Lawyers Association, 110 S.Ct. 786 (1990) 6, 7

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973) 5

Illinois Corporate Travel v. American Airlines, 889 F.2d 751 (7th Cir. 1990)..... 5

International Boxing Club v. United States, 358 U.S. 242 (1958)..... 7

Oltz v. St. Peter's Comm. Hospital, 861 F.2d 1440 (9th Cir. 1988) 7

Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) 5

United States v. Colgate, 250 U.S. 300 (1919). 3

Upjohn Co. v. United States, 449 U.S. 383 (1981) 4

Wilk v. American Medical Association, 1990-1 Trade Cas. (CCH) ¶ 68,917 7

STATUTES:

15 U.S.C. § 1 ..... *passim*

No. 89-1273

In The Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT CHRYSLER CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Pointedly ignoring the issues actually presented and decided in favor of respondent Chrysler Corporation by the courts below, twenty state Attorneys General, as Amici, have attempted to convince this Court that important antitrust issues are presented here by petitioner International Logistics Group, Ltd. (ILG). In so doing, Amici have distorted the court of appeals' holding and mischaracterized the evidence below. In rejecting ILG's claim, the lower courts merely held that Chrysler's termination of ILG as a Chrysler parts distributor for failing to follow Chrysler's unilateral nonprice distribution policies was reasonable and otherwise consistent with the antitrust laws. The larger issues argued by Amici are simply not implicated, and ILG's petition for certiorari accordingly should be denied.

ARGUMENT

I. THE ARGUMENTS OF AMICI SHOULD BE ACCORDED NO WEIGHT BECAUSE THEY ARE BASED ON AN INACCURATE RENDERING OF THE FACTS

Amici assert that ILG's claim involved a bid rigging or bid allocation agreement between it and Chrysler arising from Chrysler's non-price vertical distribution policies, which required Chrysler export distributors to sell overseas those parts they purchased directly from Chrysler. Amici concede that a bid rigging or bid allocation agreement can only arise "between two competitors" (Br. at 4). *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). Amici incorrectly assert, however, that Chrysler and ILG were competitors in the sale of parts to which Chrysler's challenged distribution policies apply.

ILG was a distributor that acquired parts from several sources, including many of the over 2400 companies other than Chrysler which make parts suitable for use in Chrysler vehicles. ILG also obtained Chrysler parts from sources other than Chrysler's export program. As to parts from these non-Chrysler sources, Chrysler's export policies had no impact on ILG's ability to obtain and to sell parts to the government at any price and under any conditions it chose. In that sense, ILG could be considered a Chrysler competitor, but no action by Chrysler involved in this case had any effect whatsoever on ILG's ability to conduct that aspect of its business.

As relevant here, ILG was at most an unauthorized distributor to the United States government of Chrys-

ler parts obtained directly from Chrysler's export program. As to these Chrysler parts, ILG was never a competitor of Chrysler, even under a dual distribution concept, because Chrysler did not permit the resale of its parts to the government. ILG's claim that it was Chrysler's competitor in the resale of Chrysler's own parts derives solely from ILG's violation of Chrysler's rules against sales to the U.S. government of parts purchased from Chrysler.[1] Thus, ILG as a Chrysler export customer was never one of Chrysler's competitors on government bids to supply Chrysler parts. Therefore, even if ILG had agreed to the distribution policies of Chrysler's export program[2], such an agreement could not constitute bid rigging or bid allocation in violation of Section 1 of the Sherman Act. *See United States v. Colgate*, 250 U.S. 300 (1919).

---

[1]As noted in Chrysler's Brief in Opposition to Petition for Certiorari, ILG continued to sell parts suitable for use in Chrysler vehicles to the United States government which it obtained from sources other than Chrysler long after it ceased being a customer of Chrysler's export program.

[2]Amici admit that ILG never agreed to refrain from submitting bids to the United States government offering parts purchased directly from Chrysler's export program, and that in fact ILG made such offers. (Br. at 3). Amici attempt instead to rely on evidence that another distributor, UWD, had agreed to withdraw a bid to the government in which it too had offered to provide parts purchased from Chrysler's export program to the government in violation of Chrysler's distribution policies. Amici also mention a third distributor, Jamco, with which Chrysler's Marine and Industrial Division contracted in 1985, two years after Chrysler stopped selling export parts to ILG, to bid on small government contracts, those under $10,000, on which Chrysler would not otherwise have bid. (Br. at 4). The trial judge specifically rejected this evidence because ILG failed "in connecting it up with evidence of similar agreements affecting [ILG's] business." (App. B-1 at 8).

II. THE AMICI'S ARGUMENTS ARE ALSO UNPERSUASIVE BECAUSE THEY MISCHARACTERIZE THE SIXTH CIRCUIT OPINION

In their brief, Amici argue the merits of legal principles extending far beyond the Sixth Circuit's limited decision regarding the termination of ILG in an effort to suggest that review by this Court is warranted.[3] As this Court has consistently held, however, the Court "sit[s] to decide concrete cases and not abstract propositions of laws." *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981). The argument of Amici is fatally flawed because the issues addressed by Amici are not properly raised by the decision below.

Amici claim that the Sixth Circuit ruled that all "agreements" between a dual distributor manufacturer and its distributors are vertical. In fact, the Sixth Circuit never reached this issue. That court, after an analysis of the particular Chrysler distribution policies at issue, ruled merely that "[t]he record disclosed that the implemented marketing policies were "vertical" non-price restraints imposed by Chrysler upon its distributors' marketing policies . . ." (App. A at 3).[4] Accordingly, despite Amici's claims to the contrary, the

[3]Amici also err in arguing from the premise that the issue the Sixth Circuit was analyzing was the legality of a bid rigging or bid allocation agreement. As discussed *supra*, no bid rigging agreement could have arisen because ILG and Chrysler were not competitors in the sale of parts to which Chrysler's distribution policies apply.

[4]In reaching this specific conclusion regarding Chrysler's export restrictions, the Sixth Circuit relied on the same directive of this Court in *Business Elec. Corp. v. Sharp Elec. Co.*, 485 U.S. 717 (1988) "to analyze restraints in terms of economic realities and not verbal abstractions" (Br. at 6) which Amici concede is the proper standard of analysis.

Sixth Circuit's ruling has no broader effect than to subject Chrysler's non-price export distribution policies to a rule of reason inquiry.

Even if the court of appeals had made the broader holding, Amici cite to no opinion of this Court with which such a ruling would conflict. In addition, such a ruling would be in accord with the prevailing view that nonprice restraints imposed by a dual distributor manufacturer on its distributors are vertical and should be analyzed pursuant to the rule of reason. *See Illinois Corporate Travel v. American Airlines,* 889 F.2d 751, 753 (7th Cir. 1990); *Ryko Mfg. Co. v. Eden Services,* 823 F.2d 1215, 1230-31 (8th Cir. 1987), *cert. denied,* 484 U.S. 1026 (1988); *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1481 (9th Cir. 1986), *modified on other grounds,* 810 F.2d 1517 (9th Cir. 1987); *Davis-Watkins Co. v. Service Merchandise,* 686 F.2d 1190, 1201-02 (6th Cir. 1982), *cert. denied,* 466 U.S. 931 (1984); *Copy-Data Systems, Inc. v. Toshiba America, Inc.,* 663 F.2d 405, 409-11 (2d Cir. 1981); *Abadir & Co. v. First Mississippi Corp.,* 651 F.2d 422, 425-28 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.,* 638 F.2d 15, 16 (4th Cir.), *cert. denied,* 454 U.S. 864 (1981).[5]

---

[5]The case relied on by Amici to support their claim that in some circumstances agreements between dual distributors and their customers are horizontal, *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 899-900 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973), involved an agreement which restricted a distributor who also competed with the supplier in the *manufacture* of certain products in the relevant market. It also preceded this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), in which this Court held that non-price restraints imposed by a manufacturer on its distributors are vertical and subject to a rule of reason analysis, rather than being *per se* illegal.

Amici also attempt to stretch the Sixth Circuit's rejection of ILG's coerced conspiracy claim into a ruling that all vertical restraints, including vertical price restraints, are *per se* legal. To the contrary, the Sixth Circuit, after analysis of Chrysler's specific non-price marketing policies, ruled only that Chrysler's unilaterally formulated and uniformly implemented export distribution policies did not violate Section 1 of the Sherman Act because "Chrysler needed no acquiescence from its . . . distributors in formulating marketing conditions for its [products]. . . ." Amici have identified no decision of this or any other court dealing with vertical non-price restraints which conflicts with the Sixth Circuit's ruling. Other courts of appeals are in agreement. *See Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1580 (11th Cir. 1988) (manufacturer's enforcement of distribution requirements not evidence of conspiracy in violation of Section 1); *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092, 1094 (5th Cir. 1987) (manufacturer's enforcement of "no subdistribution" policy not evidence of a Section 1 conspiracy). Accordingly, Amici's claim of the "astonishing" breadth of the Sixth Circuit's decision is without merit, and does not warrant review of the decision by this Court.

Finally, Amici argue, as did ILG in its petition, that ILG was not required to prove that "the government is a market". (Br. at 9). While Amici seek to rely on this Court's decisions in *FTC v. Superior Court Trial Lawyers Association*, 110 S.Ct. 786 (1990) and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), as support for this position, both cases, as well as the appellate decisions cited by Amici, relied on the discussion of a

particular market context.[6] This Court has long recognized the need for proof of a relevant antitrust market in order for a Sherman Act Section 1 plaintiff to state a claim. *See, e.g., International Boxing Club v. United States*, 358 U.S. 242 (1958). Accordingly, the Sixth Circuit's requirement that ILG prove a relevant market is not in conflict with any decision of this Court or of any court of appeals and therefore no further review of the decision is needed.

---

[6]In *Superior Court Trial Lawyers*, the recognized market was the market for provision of legal services to indigent criminal defendants in the District of Columbia Superior Court; in *Federation of Dentists*, the provision of dental services in Anderson and Lafayette, Indiana; in *Wilk v. American Medical Association*, 1990-1 Trade Cas. (CCH) ¶ 68,917 (relied on by Amici), the provision of healthcare services nationwide, particularly care for the treatment of musculoskeletal problems; and in *Oltz v. St. Peter's Comm. Hospital*, 861 F.2d 1440 (9th Cir. 1988) (also relied on by Amici), the provision of anesthesia services in the Helena, Montana area.

CONCLUSION

Amici have raised no issues of importance suggesting the need for review by this Court. ILG's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LAURENCE Z. SHIEKMAN
Counsel of Record
PHILIP H. LEBOWITZ
HELEN R. HAYNES
Pepper, Hamilton & Scheetz
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103
(215) 981-4000

PAUL R. EICHBAUER
Chrysler Corporation
P.O. Box 1919
Detroit, Michigan 48288
(313) 956-2945

Attorneys for Respondent
Chrysler Corporation

Supreme Court, U.
FILED
MAR 21 1990
JOSEPH F. SPANIOL,
CLERK

(5)

No. 89-1273

In the
Supreme Court of the United States
October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Reply of Petitioner to Brief and Supplemental Brief of Respondent in Opposition to Petition for Certiorari

ROBINS, KAPLAN, MILLER & CIRESI
James R. Safley
Counsel of Record
E. Anne McKinsey
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Petitioner

1990 — Bachman Legal Printing, 835 Second Ave. So., Mpls., MN 55402 — (612) 339-9518 ■
FAX 612-337-8053

14 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Introduction 2

Argument 2

I

Respondent's briefs demonstrate that the lower court's ruling is contrary to this Court's decisions that coerced agreements satisfy the contract, combination or conspiracy requirement of Section 1 of the Sherman Act 2

II

Respondent's briefs do not support the lower court's rigid insistence on "relevant market" proof in determining the anticompetitive effect of a bid allocation scheme in a Section 1 case 5

III

Respondent has provided no authority to support the lower court's complete disregard of a jury's findings in a rule of reason case 7

Conclusion 10

TABLE OF AUTHORITIES

Cases: **Page**

Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336 (11th Cir. 1987) 8

Albrecht v. Herald Co., 390 U.S. 145 (1968) 3, 4

Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676 (10th Cir. 1984) aff'd on reh'g, 732 F.2d 779 (10th Cir. 1984), *cert. denied,* 469 U.S. 854 (1984) 4

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) ... 7

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515 (1988) 4, 5

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977) 8

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 3

FTC v. Superior Court Trial Lawyers Association U.S. 110 S.Ct. 768 (1990) 5

International Boxing Club v. United States, 358 U.S. 242 (1958) 6

Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1979), aff'd, 417 F.2d 621 (2nd Cir. 1969) 4

Lessing v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964) 4

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3rd Cir. 1977), *cert. denied,* 436 U.S. 913 (1978) 8

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) 3, 8

NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984) 6

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 3

Syufy Enterprises v. American Multicinema, Inc., 783 F.2d 878 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) 8

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 3, 5

Yentsch v. Texaco, Inc., 630 F.2d 46 (2nd Cir. 1980) 4

No. 89-1273

In the

Supreme Court of the United States

October Term, 1989

INTERNATIONAL LOGISTICS GROUP, LTD.,
Petitioner,

v.

CHRYSLER CORPORATION,
Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Reply of Petitioner to Brief and Supplemental Brief of Respondent in Opposition to Petition for Certiorari

Petitioner International Logistics Group, Ltd. (ILG), respectfully submits the following reply to the brief and supplemental brief filed on behalf of respondent Chrysler Corporation (Chrysler) in opposing ILG's petition for writ of certiorari.

INTRODUCTION

This reply brief is submitted to correct critical errors made by Chrysler, and to clarify, to the extent necessary, the compelling reasons why this Court should grant certiorari to review the decisions below. The importance of the issues raised is underscored by the 20 *Amici* States, whose brief in support of ILG's petition elucidates the reasons why the decision of the Court of Appeals for the Sixth Circuit will insulate bid allocations and effectively undermine antitrust enforcement.

ARGUMENT

I

RESPONDENT'S BRIEFS DEMONSTRATE THAT THE LOWER COURT'S RULING IS CONTRARY TO THIS COURT'S DECISIONS THAT COERCED AGREEMENTS SATISFY THE CONTRACT, COMBINATION OR CONSPIRACY REQUIREMENT OF SECTION 1 OF THE SHERMAN ACT.

The trial record (cited in ILG's statement of facts in its petition) establishes the following: ILG and other distributors had for many years actively sold Chrysler parts to the government; beginning in 1982, Chrysler began to impose restraints on distributor bids to the government; these restraints prevented distributors from competing against Chrysler for the larger government contracts (in excess of $10,000); these were not "export restraints," but were applied to all Chrysler parts customers who sold to the government; and the purpose of these restraints was to eliminate distributor competition and allow Chrysler to sell parts to the government at inflated prices. Further, it is undisputed that Chrysler went beyond the simple announcement of policy and subjected ILG and other distributors to coercion, threats and intimidation to withdraw competing bids and refrain

from submitting bids against Chrysler on government contracts.[1]

Chrysler argues that ILG could not prove a contract, combination or conspiracy because ILG refused to go along with the bid allocation scheme (Chrysler's Brief at 7-8 & n. 7). However, a conspiracy need not be 100% successful to be actionable under Section 1 of the Sherman Act. As demonstrated in ILG's petition, Chrysler was able to secure the agreement of other distributors to withdraw bids and refrain from competing against Chrysler. It has long been established that the termination of a recalcitrant dealer or distributor done pursuant to or in furtherance of a conspiracy may violate Section 1.

It is clear that the lower court ruling would abolish the coerced conspiracy doctrine approved in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968), and *Albrecht v. Herald Co.*, 390 U.S. 145, 160 (1968). In *Albrecht*, this Court explained that the noncomplying plaintiff "might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it." *Id.* at 150, n.6.

Chrysler suggests that the holding in *Albrecht* is simply *dicta* and expresses serious doubt whether the coerced conspiracy doctrine survived *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (Chrysler's Brief at 7 n. 6). However, this Court's holding in *Monsanto* affirmed a verdict for a dealer that would not go along with the supplier. Thus, *Monsanto* does not require that a dealer agree to the supplier's restrictions in order to challenge a conspiracy. Similarly, in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-46 (1960), the termination of a retailer that continued to discount prices in contravention of the

---

[1] Although the parties' respective factual statements may diverge on some points, the facts and inferences documented in the record in support of ILG's position must be accepted in light of the lower court's affirmance of a directed verdict ruling. *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

supplier's minimum price rules was evidence of an illegal combination, where retailers that went along with program were not terminated.[2]

Chrysler's argument would lead to the anomalous result that only a distributor that went along with the bid allocation scheme, and not one that refused to comply and was terminated, could bring an action under Section 1. Such a result is surely not intended by the antitrust laws and would contravene public policy as it would encourage parties to go along with anticompetitive demands.

Chrysler also argues that a coerced conspiracy cannot result from a vertical, non-price restraint imposed by a supplier upon its customers (Chrysler's Brief at 8-9). However, no case decided by this Court has ever applied a different standard for proof of a contract, combination or conspiracy based on the nature of the restraint. In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515 (1988), this Court simply held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." 108 S. Ct. at 1525. Further, this Court reaffirmed both *Albrecht v. Herald Co.*

---

[2] Other circuits have followed this approach. *See Black Gold, Ltd. v. Rockwood Industries, Inc.*, 729 F.2d 676, 686 (10th Cir. 1984), *aff'd on reh'g*, 732 F.2d 779 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (termination of plaintiff used by defendant to require its other customers to buy both of defendant's products in furtherance of its illegal tying arrangement); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 55 (2nd Cir. 1980) (termination of plaintiff for its failure to fully comply with the pricing demands of the defendant constituted a coerced agreement); *Lessing v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied*, 377 U.S. 993 (1964) (defendant supplier secured the dealer's adherence to fix prices with threats to terminate and termination of dealers' leases and contracts when dealers did not comply with the price suggestions); *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711, 722-23 (S.D.N.Y. 1969), *aff'd*, 417 F.2d 621 (2nd Cir. 1969) (termination of distributor who refused to adhere to prices in the face of the manufacturer's affirmative efforts to secure compliance was time-honored method of furthering a conspiracy, which manifestly advanced defendant's resale price maintenance scheme and fortified the territorial restrictions with the other distributors).

and *Parke, Davis. Id.* Thus, whether a particular restraint is a "non-price restraint" is not a relevant issue to consider in determining whether a contract, combination or conspiracy has been established by the plaintiff in a Section 1 case.[3]

It was not the province of the lower court to accept Chrysler's argument that the prior holdings of this Court were mere *dictum* which should no longer be followed. Further, as the *Amici* States explain, the lower court's holding — that an agreement is really not an agreement whenever the supplier could achieve the same result unilaterally — is not only without precedent, but would potentially immunize all vertical restraints, including resale price maintenance.

II

RESPONDENT'S BRIEFS DO NOT SUPPORT THE LOWER COURT'S RIGID INSISTENCE ON "RELEVANT MARKET" PROOF IN DETERMINING THE ANTICOMPETITIVE EFFECT OF A BID ALLOCATION SCHEME IN A SECTION 1 CASE.

A. Chrysler has cited no legal authority to support the proposition that a supplier's bid allocation program is not illegal unless the plaintiff first establishes a relevant market. When the supplier and its distributors are in direct competition, a bid allocation arrangement has no redeeming value and should be condemned as illegal *per se*. ILG joins with the *Amici* States in asserting that this conclusion is mandated by this Court's recent holding in *FTC v. Superior Court Trial Lawyers Association*, 110 S.Ct. 768 (1990).

Chrysler's supplemental brief argues that ILG and Chrysler were not "competitors." This rests on the notion that ILG and other distributors were not allowed to sell to the government; *i.e.*, that "Chrysler did not permit the

---

[3] ILG does not agree that the restraints were in fact "non-price" restraints, since the purpose of Chrysler's government bid allocation scheme was to eliminate distributor price competition and permit Chrysler to charge higher prices.

resale of its parts to the government" (Chrysler Supp. Brief at 3). However, since it is undisputed that ILG did not accept Chrysler's demands to refrain from selling to the government, ILG remained a competitor (and was characterized as such in Chrysler documents). Further, the fact that other distributors did accede to Chrysler's policy does not signify that they were not competitors for purposes of antitrust analysis. Indeed, the very essence of a bid allocation scheme is that the parties reach some form of understanding that they will not compete with one another.[4]

The *Amici* States were absolutely correct in characterizing the restraints as a bid allocation, which is *per se* illegal, and expressing alarm at the holdings of the lower court which immunized that scheme as a matter of law.

B. Even if a "relevant market" had to be proved as a part of ILG's Section 1 claim, the record demonstrates that the government was at least a relevant "submarket" to consider. *International Boxing Club v. United States*, 358 U.S. 242 (1958), and *NCAA v. Board of Regents of University of Okla.*, 468 U.S. 85 (1984), both cited by Chrysler, stand for the proposition that the effect on competition in a Section 1 case can be established with a "submarket" type of analysis. Contrary to Chrysler's assertions, these cases actually support ILG's position that, even if a relevant market must be proved, the sale of Chrysler parts to the government was

---

[4] The trial record shows that ILG and other distributors were authorized to sell to the government until Chrysler decided that distributor competition was eroding its profit margins (ILG Petition at 3-7). A Chrysler report complained that "several organizations within Chrysler as well as some of their customers compete for federal government business" (P. Ex. 144). A subsequent Chrysler letter "accuses Interparts customers of pursuing government bids at prices competitive to Parts Division quotes" (P. Ex. 223).

In direct response to this competition Chrysler imposed the government bid allocation scheme. When ILG refused to go along with the scheme and continued to bid below Chrysler, it was terminated. On the other hand, those distributors such as UWD and Jamco who either withdrew competing bids at Chrysler's insistence or agreed to clear bids in advance with Chrysler could continue to act as Chrysler parts distributors. (ILG Petition at 6-7).

an appropriate submarket to consider for purposes of Section 1 analysis.

This Court's opinion in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), is far more flexible than the Sixth Circuit's ruling. This Court held:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of a submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325.

In this case, ILG proved at trial that Chrysler and everyone else regarded the government as unique, that the restraints were directed toward the government, and that sales to the government of parts suitable for use in Chrysler vehicles met all of the *Brown Shoe* submarket criteria (ILG Petition at 7-8). The lower court required ILG to establish a relevant market to far more exacting standards than this Court has ever applied in a Section 1 case.

III

RESPONDENT HAS PROVIDED NO AUTHORITY TO SUPPORT THE LOWER COURT'S COMPLETE DISREGARD OF A JURY'S FINDINGS IN A RULE OF REASON CASE.

The lower court's decision to affirm a directed verdict, notwithstanding contrary jury findings, also has raised a significant issue worthy of this Court's consideration. In an antitrust conspiracy case, where facts are disputed and demeanor of the witnesses is critical, the Court has recognized that the jury has a very important role. *See, e.g.*,

Monsanto, 465 U.S. at 768 n.14 (a case is properly submitted to the jury where there is a sharp conflict in evidence). In this case, it is particularly disturbing that no reason whatsoever was given by the Sixth Circuit for disregarding the jury's answers to special interrogatories which were returned directly adverse to Chrysler.

Chrysler misapprehends the issue which ILG seeks to raise before this Court. Although there is a serious question as to whether the trial court had authority to direct a verdict during the course of the jury's deliberations (*see* Fed. R. Civ. P. 50 (a)), ILG does not seek review of "the lower court's decision to permit the jury to continue its deliberations after granting Chrysler's motion for directed verdict" (Chrysler's brief at 6 n. 5). Instead, ILG appeals from the refusal of the trial court and Sixth Circuit to grant ILG's motion to vacate the directed verdict and to enter partial judgment on the answers to special interrogatories.

The "rule of reason" inquiry framed in this Court's recent decisions raises inherently factual questions which should be resolved by the jury. Here, the jury acted in a responsible manner, and took almost five days to deliberate. The jury was fully qualified to unanimously decide (as it did) that Chrysler engaged in a conspiracy with its customers, that the government was a relevant market, and that the conspiracy was an unreasonable restraint of trade in the relevant market. The rejection of the jury's answers by the Sixth Circuit is in clear conflict with other circuits which do not disturb jury verdicts absent compelling and fully articulated reasons.[5]

[5] Chrysler alleges that the cases cited by ILG concerning the determination of relevant market as a question of fact for the jury all sustain the grant of a directed verdict or judgment notwithstanding the verdict because of insufficient proof of relevant market (Chrysler's Brief at 13 n.10). Chrysler's reading of those cases is wrong. *See Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1341 (11th Cir. 1987); *Syufy Enterprises v. American Multicinema, Inc.*, 783 F.2d 878, 882-83 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81-82 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242, 245-46 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Chrysler also argues that submission of this issue for review is frivolous, because the jury could not unanimously resolve the question of whether Chrysler's restraints in the government market caused injury to ILG. (The jury split five to one in favor of plaintiff on this last interrogatory.) However, this result is understandable in a bifurcated trial in which ILG could not present damage proof. In the event this Court should grant certiorari in this case and reverse the Sixth Circuit, it would further the interests of justice and judicial efficiency to enter partial judgment on the interrogatories answered unanimously and not require the parties to relitigate those issues which have been already resolved by the previous fact finder.[6]

---

[6] Chrysler raises a number of issues at Part III of its Brief which were not addressed by the Sixth Circuit, but which Chrysler characterizes as "valid reasons" why the result below would not change even if ILG was successful in this appeal.

Chrysler's argument that its restrictions did not cause ILG any antitrust injury, since ILG could continue to obtain parts from "thousand of sources other than Chrysler itself" (Chrysler's brief at 4, 14), is belied by the record. After Chrysler terminated ILG, its business declined to 10% of its former volume (Tr. 717-18). Chrysler not only stopped directly supplying ILG, but also prohibited vendors from dealing with ILG (Tr. 683, P. Ex. 159, 337).

Chrysler also states that the government could obtain parts suitable for use in Chrysler vehicles from thousands of sources. However, the trial record shows that the government had unique requirements, that government contractors tended to be specialized, that relatively few companies bid on Chrysler compatible parts and that Chrysler Parts was one of the government's largest sources of noncompetitive supply (Tr. 387, 403-04, 493-95, 516-20, 674; P. Ex. 349).

Chrysler also refers to the "the presence of interbrand competition among automobile manufacturers" as a factor limiting any adverse effect on competition (Chrysler Brief at 17 n.15). Chrysler's own memorandum stated that rival automobile manufacturers, *e.g.*, Ford and GM, were not regarded as parts competitors (P. Ex. 184).

These and the other "valid reasons" raised by Chrysler are not supported by the trial record and should not divert attention from the serious issues raised in this petition.

CONCLUSION

For the reasons stated herein and in the brief of the *Amici* States, petitioner ILG respectfully urges this Court to grant certiorari in this case.

Dated: March 22, 1990

ROBINS, KAPLAN, MILLER & CIRESI

James R. Safley
Counsel of Record
E. Anne McKinsey

1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 349-8500